Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER, 1927, TERM.

No 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.
Brief in Support.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1-14

Grounds for certiorari 3

Statement of facts 4

Nature of relief sought 7

Proceedings in District Court and in Circuit Court of Appeals 8

Facts showing lack of federal jurisdiction under the Removal Act 9

Motion for writ of certiorari 13

Verification of petition 14

Certificate of counsel 14

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI 15-28

I. Illinois law is applicable to questions of title to Illinois realty 16

II. Under Illinois law, respondent's title is not clouded 16

III. The decision of the Circuit Court of Appeals, that the title is clouded, conflicts with Illinois law 19

IV. The decision of the Circuit Court of Appeals cannot be reconciled with a holding of the Supreme Court of the United States ... 19

V. The suit should be dismissed as a mere application for a declaratory decree in which the equity court is asked to adjudicate a plaintiff's own title 21

VI. Proper regard for local law was prevented by the wrongful refusal of the federal court to remand the case to the state courts 25

Conclusion 26

OPINION OF THE DISTRICT COURT (Appendix I) 29-50

OPINION OF THE CIRCUIT COURT OF APPEALS (Appendix II) 51-65

TABLE OF CASES AND STATUTE CITED.

	PAGE
Ayres v. Wiswall, 112 U. S. 187	25
Buckner v. Carr, 302 Ill. 378	18
Chicago, etc. R. Co. v. Willard, 220 U. S. 413	25
Clark v. Smith, 38 U. S. 195	16
Devine v. Los Angeles, 202 U. S. 313	20
First Congregational Church v. Page, 257 Ill. 472	18
Fraser v. Jennison, 106 U. S. 191	25
Graves v. Corbin, 132 U. S. 571	25
Greenough v. Greenough, 284 Ill. 416	17
Guffey v. Smith, 237 U. S. 101	16
Holland v. Challen, 110 U. S. 15	16
Lawson v. United States Mining Co. 207 U. S. 1	23
Liberty Warehouse Co. v. Grannis, 273 U. S. 70	22
McCarty v. McCarty, 275 Ill. 573	17
Muskrat v. United States, 219 U. S. 346	21
New Jersey v. Sergeant, 269 U. S. 328	21
Paine v. Doughty, 251 Ill. 396	22
Parker v. Shannon, 114 Ill. 192; 121 Ill. 452	16
Phelps v. Harris, 101 U. S. 370	23
Prather v. Lewis, 287 Ill. 304	22
Rigdon v. Shirk, 127 Ill. 411	16
Seeley v. Baldwin, 185 Ill. 211	22
Subirana v. Kraemer, 17 Fed. (2nd) 725	24
Torrence v. Shedd, 144 U. S. 527	25
United States v. Alaska Steamship Co. 239 U. S. 466	21
Warren v. Warren, 279 Ill. 217	18
Wehrman v. Conklin, 155 U. S. 314	23
Wilson v. Oswego Township, 151 U. S. 56	25

STATUTE: Section 71, Chapter 3, Title 28, District Courts; Removal of Causes 10

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Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court of the United States:

Your petitioners, The Northern Trust Company and Mark S. Willing as trustees under the last will and testament of Henry J. Willing, deceased, and Mark S. Willing, individually, praying for a writ of certiorari to review a decision in the United States Circuit Court of Appeals for the Seventh Circuit reversing a decree entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, and remanding the case for further proceedings, respectfully submit:

Questions of equity jurisdiction and of federal jurisdiction are involved in this suit, filed on the chancery side of court and called a bill to remove clouds from title. It arises from the desire of Chicago Auditorium

Association, an Illinois corporation, respondent here and plaintiff below, to tear down the nationally known Auditorium Building in Chicago and to erect in its stead a skyscraper adapted to commercial purposes, all without the consent of these petitioners and others owning the property.

Whether the Association has the right so to alter the use of the premises depends upon the meaning and effect of leases between these petitioners and others as lessors and the Association as lessee. Prior to litigation, the lessee orally asserted it has such right under a proper construction of its leases. The petitioners (lessors) orally answered that the lessee has not the right. Thereupon, claiming that these petitioners' views, so expressed, constitute a cloud upon its leasehold title, the respondent (lessee) instituted this proceeding for "removal" of the "cloud".

After a trial, the District Court, upon these petitioners' motions, dismissed the bill for want of equity jurisdiction, deciding that under both local and general law no cloud on respondent's title existed, that no wrong had been done or threatened by any defendant, and that the self-styled bill to remove clouds from title was simply a disguised application for a declaratory judgment or decree construing the leases. (The trial court's opinion, reported at 8 Fed. (2nd) 998, also is printed as Appendix I at page 29, *post*.)

On appeal by the Association, the Circuit Court of Appeals for the Seventh Circuit reversed the decision of the District Court, holding that under "liberal" principles of law in states other than Illinois a cloud on title was sufficiently alleged to invoke equity jurisdiction for its removal. The court then remanded the case for trial upon the merits. (The opinion, not yet reported, appears as Appendix II at page 51, *post*.)

Grounds for Certiorari.

Confident they can demonstrate to the Supreme Court that no cloud upon title exists and that without such cloud equity jurisdiction is lacking, your petitioners submit these reasons for the granting of the writ of certiorari:

1. The Circuit Court of Appeals, by its reversal, has decided an important question of local law in a way in conflict with applicable local decisions, in that the Circuit Court of Appeals has decided certain facts do constitute a cloud upon title to Illinois property, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The Circuit Court of Appeals, by its decision thus conflicting with local law, has erroneously constructed a non-existent cloud upon title, without which wrong no proper case or controversy is presented; and so the entire proceeding becomes an application for a declaratory decree simply construing contracts *inter vivos*.

3. Obedience to that local law which defeats equity jurisdiction by eliminating the alleged cloud upon title was further precluded by the erroneous persistence of the federal courts in retaining the suit under the Removal Act, notwithstanding that citizens of the same state are plaintiff and defendant and that no separable controversy exists as to the removing party.

4. The Circuit Court of Appeals, by its decision, has decided an important question of general law in a way conflicting with decisions of the Supreme Court of The United States and conflicting with decisions of other Circuit Courts of Appeals, in that the court has held a plaintiff's own title can be adjudicated in a suit brought to remove alleged clouds, whereas this honorable court has said a plaintiff's own title cannot be adjudicated in such suit.

STATEMENT OF THE CASE.

The facts upon which your petitioners base the foregoing reasons for the granting of the writ of certiorari are as follows:

The bill of complaint (R. 3) was filed June 13, 1923, in the Circuit Court of Cook County, State of Illinois. It avers and subsequent evidence tended to prove Chicago Auditorium Association, incorporated in 1886 for the purposes of constructing and maintaining a building containing a large auditorium and rooms with facilities for musical, dramatic, operatic and other entertainments, to encourage the holding of large gatherings, and to found and maintain galleries and organizations for useful and aesthetic arts, leased five adjoining parcels of land situated in Michigan Avenue at Congress Street in the business district of Chicago under five substantially similar indentures dated early in 1887, for 99 years, three of which were extended in 1891 for 100 years. On this site the Association, pursuant to covenants in the leases, erected the monumental Auditorium Building, which is an unseverable unit in construction and includes one of the world's finest auditoriums, a 300-room hotel and many offices.

For forty years the building has remained and now is in constant unimpaired use. Although the building continues to satisfy amply the semi-institutional purposes for which the Association was founded and financed, men unconcerned with those purposes recently obtained a controlling amount of capital stock (R. 245, 259), changed the chartered objects of the corporation (R. 4), and proposed to tear down the building in order to replace it with a commercial skyscraper from which "we would get a benefit, a large revenue." (R. 258.)

Admittedly the leases do not expressly grant to the lessee the rights it sought. Whether, under any and all the covenants of the leases, such rights were conveyed by implication called for the answer, as the respondent itself says (R. 29), to "a question which, as between your orator and the defendants owning or interested in the fee of said property * * presents a common issue of law and fact substantially identical with respect to the interests of the said several defendants."

The lessee proceeded to sound out its landlords, starting in 1921, when R. Floyd Clinch, its president, broached the proposal to the owners of one tract. Those landlords were and are trustees of decedents' estates, citizens of Boston and New York, and are known in the record as the Sears-Slater Trustees. They hold title to about 10% of the total ground area under the Auditorium. Two or three friendly conferences with them were held in Chicago, during which they and their counsel discussed quite informally the respective rights of lessors and lessee. Finally President Clinch suggested buying the Sears-Slater tract or increasing the ground rental to gain sanction for his plan. No agreement was reached, however, and President Clinch in 1922 went to the office of these petitioners who own about 80% of the fee. There President Clinch related briefly his negotiations with the Sears-Slater interests and said no deal was possible unless the Association could simultaneously buy or control the Willing fee. "Mr. Willing seemed to think that he didn't know whether he cared to sell," testified President Clinch. (R. 242 *et seq.*) "He disagreed with me as to our ideas of right to reconstruct without consent, but in the course of the conversation they said they might sell for $1,500,000 [being less than one-half the appraised value. R. 286-7]. I told

them that was out of the question; that we could not consider anything of the kind, and if we could not come to any closer terms I presumed that the only thing to do would be to bring a friendly suit in equity. Well, he said he guessed that was the only thing that could be done."

Thereupon the conference ended, and *that is literally everything done or said by these petitioners to "cloud" the Association's title.* (The evidence commences on page 240 of the record, running on two ensuing pages, and is resumed at page 253 briefly). All that transpired was confined, so far as these petitioners are involved, to one friendly conference attended only by the parties themselves. No threat or suggestion of any affirmative action ever was made. Nothing was written; all was oral and privately conducted.

No further negotiations were attempted, but after a year, during which all was tranquil, the bill of complaint was filed.

The plaintiff's case showed the making of the leases, extension agreements with these petitioners and with the Sears-Slater Trustees, construction of the present building by the lessee pursuant to the leases, use thereof for nearly forty years without financial profit, prospects of further loss, etc., and that the highest and best use of the property for the financial gain of the lessee would be the replacement of the Auditorium Building by a modern skyscraper costing more than the old one and adapted to commercial purposes. Nevertheless, concludes the bill (R. 28; also at R. 239) the defendants "or some of them" "claim and assert, and by reason of such claim and assertion" bankers asked to finance the proposed new undertaking are "fearful" "that the present building cannot be removed without a violation of the terms, covenants and conditions" of the leases,

even though the removal be incidental to erection of a new building. (It is not contended that any lessor ever expressed any views of any sort to any banker or other person).

Lastly, the bill attempts to define the cloud upon title which the court is to remove (R. 28):

> "The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said property have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of the said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law."

The prayer for relief (R. 31) asks "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises" upon giving security to be fixed by the court until a new building is completed. When the program has been defined and all the new terms have been decreed, the defendants are to be enjoined from interference with its execution.

No allegation is made and no proof was offered that any defendant ever has done aught which remotely hampers the lessee in the full and perfect enjoyment of its present use and occupancy of the demised prem-

ises authorized in the leases. The only complaint is a lack of concurrence by the petitioners in the lessee's future program for its financial gain; and the petitioners' lack of concurrence originated after voluntary challenge by the lessee, having been evidenced solely by oral statements made to none but the lessee.

Motions to dismiss under Equity Rule 29 were made by these petitioners as defendants (R. 137), and others. On April 18, 1924, Judge James H. Wilkerson, District Court Judge, overruled the motions (R. 140), but simultaneously filed his "Decision On Motion To Dismiss" (R. 140), stating that the points urged in support of the motion might be pressed after the testimony had been taken. Thereafter the petitioners answered (R. 160), and much evidence was received, for under the circumstances both sides went into the factual issues.

On December 7, 1925, after arguments and briefs, the trial judge made his decision (R. 542), which, after stating at length the facts as they appeared to the court, declared the bill of complaint not sustainable as a bill to remove clouds from title because no cloud existed, and not sustainable under any other established principle of chancery procedure. (See Appendix I, p. 50, *post.*) On January 30, 1926, a short decree dismissed the bill "for want of equity jurisdiction to grant any relief upon the pleadings and the evidence, but without prejudice to whatever rights the plaintiff may have under the leases here involved when asserted in any appropriate proceeding or otherwise." (R. 563.)

An appeal was taken by Chicago Auditorium Association to the Circuit Court of Appeals for the Seventh Circuit, which, on June 7, 1927, entered orders reversing the decree and remanding the case with direction to the District Court to hear the evidence and determine

the issues involved. (R. 611.) Rehearing was denied August 30, 1927, and mandate later was stayed (R. 665) for this petition.

The holding of the Circuit Court of Appeals is contained largely in this language of the opinion (p. 58, *post*):

> "And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title."

To reach its conclusions, and particularly its conclusion as to what constitutes a cloud upon title in this case, the Circuit Court of Appeals completely ignored many decisions of the Supreme Court of Illinois holding that a title is not clouded by oral hostile assertions of opinion as to the construction of provisions in the instrument under which a plaintiff claims his own title. (Brief, pp. 16-19, *post*.) And in remanding the case, the Circuit Court of Appeals fails to inform the trial court what to remove as a cloud. These matters were pointed out by your petitioners repeatedly (see especially their Petition for Rehearing, R. 617-8), but the Circuit Court of Appeals omitted all explanation for its decision so conflicting with local laws.

Had the case been decided in an Illinois court, your petitioners think compliance with Illinois substantive law would naturally have brought about a result directly contrary to the present reversal. Your petitioners believe that both the United States District Court and the Circuit Court of Appeals wrongfully persisted in retaining federal jurisdiction under the Removal Act. Twice these petitioners attempted to have the case remanded, but in vain.

The original bill of complaint was filed in the Circuit

Court of Cook County, an Illinois state court. Its removal to the federal court was procured upon petition of the Sears-Slater Trustees, owners of one fee, not citizens of Illinois. Their petition (R. 112) recites diversity of citizenship and avers a separable controversy between the Illinois plaintiff and said Sears-Slater Trustees as defendants.

After removal, these petitioners filed in the District Court their motions to remand to the state court (R. 194-5) on the grounds that no separable controversy under Sec. 71, Chap. 3, Title 28 (formerly Sec. 28 of Jud. Code as amended, Act Jan. 20, 1914, c. 11) exists. The pertinent provision is:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

The motion was overruled in the District Court (R. 196-7) without opinion.

Again in the Circuit Court of Appeals by leave the motion was renewed (R. 635) and again was overruled without comment. (R. 664.)

The lease of the Sears-Slater Trustees with the respondent and the two leases of your petitioners with the respondent are identical in all relevant provisions. (R. 34, 51, 68.) The respondent's bill of complaint itself declares the question to be decided is "a common issue of law and fact substantially identical with respect to the interests of the said several defendants" (R. 29). It also says that the five tracts of land form one contiguous area covered by "one entire building" (R. 17). "None of those parts of said building which are located upon the

respective tracts of ground demised by [these petitioners'] leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

The position of the Sears-Slater Trustees as to their 10% of the fee and the position of these petitioners as to their 80% is identical in all substantial respects.

Furthermore, an unexpired first mortgage of February 1, 1889, by the lessee conveyed the leasehold as a whole on all tracts. So did an unexpired second mortgage in 1892. (R. 15 and 16.) The mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois.

Should relief complying with the prayer of the bill of complaint ever be granted, such relief must be spread over the whole property as against all fee owners, all bondholders and all others interested. The question must be decided, if at all, by a construction of the leases, and the lease of the Sears-Slater Trustees is identical with the leases of your petitioners in all relevant provisions. No different question is to be decided as between the lessee and either set of lessors.

While the removing Sears-Slater Trustees are not citizens of Illinois, your petitioners are and at all relevant times have been citizens of Illinois, which is the state of

citizenship of Chicago Auditorium Association (R. 3). The mortgage trustee, too, always has been a citizen of Illinois. And the record indicates that the Chapins, owners and lessors of the remaining 10% (called the Studebaker fee), not heretofore specifically mentioned, are citizens of Illinois; their leases are identical in all material respects and are affected.

Denied a return to the proper forum and thus forced to remain in the federal courts, your petitioners have been further deprived of the benefit of applicable local property law.

Hence it is, and for additional reasons hereafter set forth in counsel's brief, your petitioners say review upon the granting of a writ of certiorari is proper, for that:

1. The decision of the Circuit Court of Appeals conflicts with applicable Illinois law because the Circuit Court of Appeals has sustained equity jurisdiction on the theory that these petitioners have clouded respondent's title, whereas Illinois law expressly holds that these petitioners have not clouded the title.

2. Such disregard for that local law, which shows that no cloud on title exists, is entirely responsible for the reversal of the Circuit Court of Appeals. The essential element of any wrong done by a defendant to a plaintiff does not exist when Illinois law is observed. Without that wrong or cloud, no justiciable case or controversy is presented, and the bill must be dismissed as an application for a declaratory decree.

3. Petitioners were wrongfully compelled to defend in a federal court because of lack of any separable controversy between the removing party and the respondent, thereby being further deprived of their lawful opportunity to abide by Illinois substantive law.

4. The Circuit Court of Appeals, by its decision, having failed to point out any fact or act done by any defendant in the proceeding constituting a cloud on title, has remanded the case to the trial court with directions that the trial court simply adjudicate the plaintiff's own title in the chancery proceeding. That function has been held improper by decisions of the Supreme Court of the United States and by other Circuit Courts of Appeals.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting in the City of Chicago, State of Illinois, commanding the said court to certify and send to this court on a day to be designated a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that said final orders of said Circuit Court of Appeals be reversed or altered by this Honorable Court; and they also pray for such other, further or different relief as may seem proper.

And your petitioners will ever pray, etc.

MARK SKINNER WILLING and
THE NORTHERN TRUST COMPANY,
As Trustees under the Last Will and Testament of Henry J. Willing, deceased,
MARK S. WILLING,
Petitioners.

CHARLES E. HUGHES
SAMUEL TOPLIFF
HOMER H. COOPER
Counsel.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

MARK S. WILLING, being duly sworn, deposes and says that he is one of the petitioners above named; that he has read the foregoing petition by him subscribed, and that he verily believes the facts therein stated are true.

MARK S. WILLING.

Subscribed and sworn to before me, a notary public in and for the county and state above stated, duly authorized by law to administer oaths therein, this 27th day of September, A. D. 1927.

FLORENCE E. HANNA
Notary Public.

CERTIFICATE OF COUNSEL.

We, Charles E. Hughes, Samuel Topliff and Homer H. Cooper, attorneys and counsellors at law, duly admitted to practice in the Supreme Court of the United States, DO HEREBY CERTIFY that we have examined the foregoing petition for a Writ of Certiorari; that the petition is not made for delay, but, in our opinion, is wholly meritorious and ought to be granted.

Dated, September 28, 1927.

CHARLES E. HUGHES,

SAMUEL TOPLIFF,

HOMER H. COOPER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

MAY IT PLEASE THE COURT:

At the trial, the respondent as plaintiff sought justification for its application to equity upon the numerous theories considered in the District Court's opinion, but upon appeal the respondent narrowed its contentions to the single theory that the lessors have clouded its title and, therefore, equity has jurisdiction to remove the cloud.

By its decision reversing the trial court's decree, the Circuit Court of Appeals holds with the respondent that a cloud upon title is averred, and that the existence of that cloud is a wrong which equity can remove.

Wherefore, the test of equity jurisdiction is, Do the facts and circumstances in this record constitute a cloud upon title? Only by an affirmative answer can the decision of the Circuit Court of Appeals stand; for, if there is no cloud, obviously there is nothing upon which equity can act.

We think that we can convince this Honorable Court that, under proper considerations, no cloud upon title exists. If we are granted the opportunity to do so, and succeed, the decision of the Circuit Court of Appeals must be altered.

I.

THE SUBJECT MATTER IS REAL ESTATE LYING IN THE STATE OF ILLINOIS, REQUIRING THE APPLICATION OF ILLINOIS LAW IN DETERMINATION OF QUESTIONS OF TITLE.

Under a well-established rule, running through decisions such as—

(1914) *Guffey* v. *Smith*, 237 U. S. 101;
(1883) *Holland* v. *Challen*, 110 U. S. 15; and
(1839) *Clark* v. *Smith*, 38 U. S. 195,

—Illinois substantive law *alone* is applicable to determine what title the respondent has, or whether that title is clouded.

II.

DECISIONS OF THE HIGHEST COURT OF THE STATE OF ILLINOIS HOLD THAT DOUBTFUL PROVISIONS IN AN OWNER'S MUNIMENT OF TITLE, COUPLED WITH ORAL HOSTILE ASSERTIONS BY AN ADVERSE CLAIMANT, DO NOT CONSTITUTE A CLOUD UPON THAT TITLE.

As early as 1885, the Supreme Court of Illinois, in two appeals of *Parker* v. *Shannon*, 114 Ill. 192, and 121 Ill. 452, held that—

> "Such clouds upon title, as may be removed by courts of equity, are *instruments or other proceedings in writing*, which appear upon the records and thereby cast doubt upon validity of the record title."

In 1889, the Supreme Court defined a cloud upon title in *Rigdon* v. *Shirk*, 127 Ill. 411, thus:

> "A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, *appearing in some legal form*, but which is, in fact, unfounded, or which it would be inequitable to enforce."

In 1916 came *McCarty* v. *McCarty*, 275 Ill. 573, where two sets of claimants asserted interests in the same land under the same granting instrument. The claimants in possession filed their bill to remove, as clouds upon title, the oral hostile assertions of the adverse claimants. In brief, there was an oral dispute as to the construction of the plaintiff's one muniment of title, and the Illinois Supreme Court, holding that no cloud upon title thereby existed, said:

> "Considered as a bill to quiet title, or remove a cloud, there was no averment of fact that would give the court jurisdiction. * * * The only averment in the bill respecting any claim contrary to [complainant's] right was that some of the relatives of the testator were [orally] contending that the remainders were vested and not contingent and that it was not possible to destroy such remainders; but *courts of equity do not take jurisdiction to remove a mere verbal assertion of ownership in land as a cloud upon title.* * * * A cloud upon a title is a claim apparently valid which may be removed by extrinsic evidence, but if there was any defect in the title of [complainant] it appeared on the face of the will and resort to extrinsic evidence was not necessary. * * * No controversy in any legal form has arisen, and there is no occasion to call upon a court to quiet *a title already quiet and in a state of perfect tranquillity.*"

The last decision in point came in 1918—*Greenough* v. *Greenough*, 284 Ill. 416, where, as in the case we are petitioning to bring before this court, there was a dispute between adverse parties, based upon a difference of opinion as to the construction of a plaintiff's granting instrument of title, evidenced solely by contradictory oral assertions. In the decision, the Supreme Court of Illinois held:

> "Neither can mere verbal claims of parties against an owner in possession be regarded as constituting a cloud on his title and as giving a court of equity jurisdiction to remove the cloud."

The rule unbrokenly runs through other Illinois decisions, including:

(1922) *Buckner* v. *Carr*, 302 Ill. 378.

(1917) *Warren* v. *Warren*, 279 Ill. 217.

(1913) *First Congregational Church* v. *Page*, 257 Ill. 472.

Thus by the substantive property law of the state where our property is situated, we find that a title is not clouded unless the adverse claim is asserted in some legal form, evidenced by an instrument or some proceedings in writing appearing of record, not being the same instrument which a plaintiff must produce to show his own title, and, if removable, must require extrinsic evidence.

The acts here charged against the petitioners consist only of oral assertions of opinion as to incidental rights of user by their tenant under its leases. Our denials of the respondent's claim that it has a right to tear down our building and to rebuild were not asserted in any legal form, were not evidenced by any instrument or writing, were not of record, and, if wrong, can be shown wrong solely by construction of the only instruments under which the respondent has title.

Notwithstanding this situation, and counter to these Illinois decisions dutifully urged by us in our brief, argument and petition for rehearing (Rec., 617-8), the Circuit Court of Appeals predicates equity jurisdiction wholly upon its finding that our acts cloud the title.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE STATE OF ILLINOIS UPON THE STATUS OF TITLE TO ILLINOIS REALTY.

In the course of its opinion (see pp. 58-9, *post*), the Circuit Court of Appeals considers in a general way what constitutes a cloud upon title, saying "A cloud upon title is a relative term." But instead of measuring the relation to title by the substantive law of the sovereignty which makes possible and defines the title, the court, we respectfully urge, has completely ignored Illinois law. No effort is made to reconcile the decision with the Illinois rule we have above set forth. Instead of following Illinois decisions as to what constitutes a cloud upon title, the court deliberately chooses to follow "liberal holdings" in nine other states, none of which, by the way, goes so far.

The statement of the Circuit Court of Appeals (p. 59, *post*)—that the lessors' "position" "manifested by oral pronouncement and by their refusal to consent to the rebuilding," "in addition to the clauses" of the leases themselves, constitutes a cloud upon the lessee's title—cannot be reconciled with the land law of Illinois.

Furthermore—

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS CANNOT BE RECONCILED WITH A DECISION OF THE SUPREME COURT OF THE UNITED STATES.

In the one case decided by this Honorable Court found by us and bearing upon the immediate question—(1906)

Devine v. *Los Angeles*, 202 U. S. 313,—the court, disposing of a similar contention urged by a litigant to sustain equity jurisdiction, said:

> "We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title * * *."

Possibly one reason for a general rule of this kind is found in the nature of the practical relief to be granted. Ordinarily the removal of a cloud calls for removal of something concrete, definite, certain: an instrument must be canceled, etc. Here, however, the so-called cloud pointed out by the Circuit Court of Appeals is incapable of "removal"; for it is our "position respecting this lease" "in addition to the clauses" in the lessee's primary granting instrument which "constitutes a removable cloud," it is held. Repeatedly we have urged that a test of equity jurisdiction here is an attempt to draft a decree granting the relief prayed. The draftsman finds it necessary to construe the leases—and then he is done. No word, clause or paragraph of any instrument is stricken down; no document is canceled; nothing is commanded by the courts. Would our oral "position respecting this lease" be "removed" by directing us to maintain silence? And would the clauses in the lease upon which we are alleged to base our position be "removed" by striking them out of the lessee's granting instrument? If so, there would be very little of the leases left.

Manifestly, everything sought after by the respondent, and everything the Circuit Court of Appeals by its reversal says is within the judicial function, is a construction of these leases. As plaintiff below, the respondent in its bill asserts (Rec., 28):

> "Under the proper construction and interpretation of the terms, covenants and conditions of said

several leases, your orator is fully empowered and has the right to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors * * * upon furnishing proper and adequate security during the removal. * * *"

The prayer for relief, though couched in the phraseology of a bill to remove clouds (Rec., 31), in reality calls upon the courts simply to sanction that construction and interpretation. Contracts *inter vivos* may be construed in proper cases, but, inasmuch as none of the lessors here has clouded the lessee's title or committed any other wrong against the lessee, no proper case or controversy is presented entitling the respondent to a construction. Hence it is that we submit—

V.

EQUITY JURISDICTION SHOULD BE DENIED BECAUSE THE CASE STATED BY THE RESPONDENT IS AN APPLICATION FOR A DECLARATORY DECREE.

In landmark decisions, this court has spoken upon the essential elements of a justiciable case or controversy:

(1910) *Muskrat* v. *United States*, 219 U. S. 346.
(1916) *United States* v. *Alaska Steamship Co.* 239 U. S. 466.
(1926) *New Jersey* v. *Sargent*, 269 U. S. 328.

One essential element is that of a wrong done by a defendant to a plaintiff. The wrong here averred is that the lessors have clouded the lessee's title. But under proper rules that wrong does not exist; the title is not clouded. Therefore, the essential element of a

wrong is wholly lacking. Without that element, the respondent submits nothing more than an application for a declaratory decree, disguised as a bill to remove clouds. The direction of the Circuit Court of Appeals to the District Court to construe the leases is a direction to perform a task not within the judical function.

(1927) *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

Illinois has no declaratory judgment statute or procedure, and this suit, upon the same considerations, would fail in state courts:

(1919) *Prather* v. *Lewis*, 287 Ill. 304.
(1911) *Paine* v. *Doughty*, 251 Ill. 396.
(1900) *Seeley* v. *Baldwin*, 185 Ill. 211.

AS A BILL TO DECLARE RIGHTS UNDER THE LEASES, THE EXERCISE OF JUDICIAL POWER WOULD BE PARTICULARLY MISCHIEVOUS BECAUSE A COURT OF EQUITY IS CALLED UPON TO ADJUDICATE A PLAINTIFF'S OWN TITLE.

Whatever be the head of equity jurisprudence under which this anomalous proceeding is thrust by its proponent, the controlling question presented for examination is: Has the plaintiff the right, or title, it claims? That is to say, a court first of all must construe the leases to find the plaintiff's title before ever entering upon any inquiry as to any defendant's claim. Furthermore, the answer to the above controlling question simultaneously decides the defendant's claim. One movement—the construction of the leases—determines every main issue; for the claims are conflicting.

But that process is not removing clouds from a plaintiff's title; that is exactly the process of adjudicating the plaintiff's own title in a declaratory proceeding. Suits to remove clouds from title are not the proper way to

decide conflicting claims of the parties signatory to the plaintiff's sole muniment of title. A suit to remove clouds from title presupposes the validity and existence of a plaintiff's own title, and is directed exclusively against the alleged invalid claim of a defendant to be shown by extrinsic facts.

(1894) *Wehrman* v. *Conklin*, 155 U. S. 314, on 322.

(1907) *Lawson* v. *United States Mining Co.*, 207 U. S. 1.

And the following excerpt from (1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375, stating that adjudication of a plaintiff's title is improper in a suit to remove clouds, is, we think, founded upon the constitutional separation of law and equity:

"The questions: what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent among these are: first, that the title or right of the complainant must be clear; and, second, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. 'Those only,' said Mr. Justice Grier, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' *Orton* v. *Smith*, 18 How. 263; 59 U. S. 393; and see *Ward* v. *Chamberlain*, 2 Black 430, 444; 58 L. Ed. 319, 326; *West* v. *Schnebly*, 54 Ill. 523; *Huntington* v. *Allen*, 44 Miss. 654; *Stark* v. *Starrs*, 6 Wall. 402; 73 U. S. 925. And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled

> to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

The recent decision of the Circuit Court of Appeals for the First Circuit in (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, reiterates the doctrine, saying:

> "It is well established in the federal courts that 'those only who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or to dissipate a cloud on the title.'
>
> * * * * *
>
> Furthermore, it is not the jurisdiction of equity to adjudicate upon the conflicting titles of parties to real estate—that is for the law court; and one who brings a bill in equity to remove a cloud upon his title must not only set out facts showing that he has a clear legal title, but also set out the pretended title or right of the defendant claimed to be a cloud upon his title, that it is clearly invalid and such as may, at the present or a future time, embarrass him in controverting it."

In the cause here submitted, the respondent as plaintiff is compelled to admit its own averred title is doubtful. Were that not the situation, respondent would have proceeded to tear down the Auditorium without awaiting legal sanction. To resolve the doubt of its own self-alleged rights, the respondent is asking for an adjudication of its title. The Circuit Court of Appeals for the Seventh Circuit declares the procedure, when released from the limitations of substantive local law, a proper function for federal courts. That holding, we think, is a departure from the accepted rule and in conflict with the weight of authority.

VI.

THESE PETITIONERS WERE WRONGFULLY PREVENTED FROM LITIGATING IN THE COURTS OF THE STATE OF ILLINOIS WHERE LOCAL PROPERTY LAW WOULD HAVE BEEN FOLLOWED AND A DIFFERENT RESULT WOULD HAVE BEEN OBTAINED.

In the petition itself, we have stated the facts upon which we base our contention that the federal courts sitting in Chicago did improperly persist in retaining federal jurisdiction over this lawsuit.

The meaning of the Removal Act is not obscure. There is no separable, removable controversy unless there is a separate and distinct cause of action as to the defendants seeking removal which can be decided as between said defendants and the plaintiff in the absence of all other defendants.

(1892) *Torrence* v. *Shedd,* 144 U. S. 527.
(1882) *Fraser* v. *Jennison,* 106 U. S. 191.
(1884) *Ayers* v. *Wiswall,* 112 U. S. 187.
(1894) *Wilson* v. *Oswego Township,* 151 U. S. 56.

It is the duty of a federal court, at whatever stage of litigation it discerns that federal jurisdiction is lacking, to remand to a state court.

(1911) *Chicago, etc. R. Co.* v. *Willard,* 220 U. S. 413.
(1890) *Graves* v. *Corbin,* 132 U. S. 571.
(1892) *Torrence* v. *Shedd,* 144 U. S. 527.

The provisions in all the leases of all the lessors with the lessee, at all pertinent, are identical. The five plots of ground form one contiguous tract covered by one unseverable building, with inter-related easements of support, under two general mortgages.

The substance of the controversy is the same as to all defending lessors. The suit was begun in an Illinois

state court. Its removal to the federal court was procured upon petition of the Sears-Slater Trustees, defendants, not citizens of Illinois. They own one of the five plots. Their petition for removal shows diversity of citizenship between the Illinois plaintiff and themselves, and then avers a separable controversy between the plaintiff and themselves. But it is obvious that there was no separable controversy. There was only one controversy which affected alike all the defendants, and in any alignment of parties on either side of this controversy the Sears-Slater Trustees must be aligned with these petitioners and other defendants who are citizens of Illinois. The fact that the Sears-Slater Trustees are not citizens of Illinois, while all other active parties, plaintiff and defendant alike, are citizens of Illinois, does not support the lower courts' overrulings of our motions to remand. No expression of opinion accompanied these holdings in either court. The error seems palpable.

Whether, if review be permitted, this Honorable Court shall deem it proper to consider the question of equity jurisdiction is a point coupled directly to a possible consideration that the whole question is one for the state courts. Our immediate concern is that the petitioners not only were deprived of the benefit of local law, but were wrongfully compelled to stay in courts where local agencies for administration of state law were unable to act.

Conclusion.

The case set up by Chicago Auditorium Association is not a case or controversy for the courts. The petitioners and other lessors oppose operation of judicial force because they believe no court can grant the relief sought by respondent without making new contracts between lessors and lessee, which naturally is a matter for commercial adjustment.

Under the property law of Illinois, no lessor had clouded the title of respondent's leasehold title. If, as the Circuit Court of Appeals thinks, other states have more "liberal" holdings under which a mere "position" taken by a landlord in answer to his tenant's challenge constitutes a cloud, that, we think, is the concern of the states; and, we respectfully contend, it is not proper for the Circuit Court of Appeals for the Seventh Circuit to apply such foreign substantive law in order to determine Illinois titles or the clouds thereon.

The procedure, thus established, by which parties to contracts can obtain judicial construction or alteration of the terms thereof prior to the existence of any wrong done by one to the other is a departure opening the doorway of federal equity jurisprudence to the forbidden declaratory judgment.

The rule in the courts of the United States, as now laid down in this decision of this Circuit Court of Appeals, is as follows: A federal court of chancery has original jurisdiction to construe leases of realty whenever the parties thereto are unable to agree as to the meaning and effect of the leases to the future detriment of the lessee, because doubtful clauses of the instrument accompanied by an orally manifested position taken by a lessor adverse to an orally advanced claim made by a lessee, constitute a cloud upon the title of the lessee which federal courts, regardless of opposing local law defining clouds upon title, are empowered to remove.

Under this rule, any tenant is able to obtain a declaration of his demised rights through the fiction of creating a cloud upon his leasehold by talking with his landlord. Surely this strange doctrine should not be permitted to stand and to clutter the federal courts with as many so-called bills to remove clouds as there are similar disputes between lessors and lessees.

The writ of certiorari should be granted and review of the case should be permitted to correct these errors:

1. The decision of the Circuit Court of Appeals that the petitioners have ever clouded the title of the respondent.

(Illinois law says the petitioners have not clouded the title, and the decision conflicts with applicable Illinois law.)

2. The decision of the Circuit Court of Appeals that equity has jurisdiction.

(Since there is no cloud on title under local law, or under federal decision, there is nothing to remove. Hence, the case is an application for a declaratory decree.)

3. The refusal of the Circuit Court of Appeals and the refusal of the District Court to remand the case to the state courts under the Removal Act.

(By wrongfully retaining federal jurisdiction, the federal courts completely prevented the petitioners from invoking local substantive law.)

4. The decision of the Circuit Court of Appeals, conflicting with decisions of the Supreme Court and of other Circuit Courts of Appeals, to the effect that a federal court of chancery is empowered to adjudicate a plaintiff's legal title in a suit brought for that purpose.

Respectfully submitted,

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SAMUEL TOPLIFF,

HOMER H. COOPER,
Counsel for Petitioners.

APPENDIX I.

Opinion of the District Court.

Wilkerson, *District Judge.* Plaintiff is the lessee under leases covering the ground upon which the Chicago Auditorium Building is erected. The leases cover five separate parcels of land and were executed in 1887. In two of the leases Wirt D. Walker was the lessor, and Mark Skinner Willing, as trustee, and other defendants, as set forth in the pleadings, have succeeded to his interest. In another of the leases Walter G. Peck, Clarence I. Peck, and Ferd W. Peck were the lessors, and William A. Slater, as trustee, and other defendants, as set forth in the pleadings, have succeeded to this interest. In two of the leases Studebaker Bros. Manufacturing Company was the lessor, and Emily C. Chapin and other defendants, as set forth in the bill, succeeded to this interest.

In essential respects the provisions of the leases are the same. They are for the period of 99 years. The lessee agrees to forthwith begin and to build on the premises a substantial and solid fireproof building of brick, stone, iron, steel, and tile, and such other materials as are necessary and usual in fireproof buildings in the city of Chicago, the same to be in all respects in accordance with the building ordinances of the city of Chicago, and to carry on and prosecute the erection of the building with all reasonable dispatch, and to have the same completed before August 1, 1889; the building in the character of the materials to be used in its construction, to be as follows:

"All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists, and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick or hollow tile; the roof shall be iron, brick, or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part."

In one of the Walker leases it is provided that the building to be built on the premises shall cost not less than $475,000; in the other it is provided that the building shall cost not less than $275,000. In the Peck lease it is provided that the building on the premises shall cost not less than $400,000. In the Studebaker leases it is provided that the building to be erected on each parcel shall cost not less than $50,000. The leases provide for fixed rentals until August 1, 1906, after which date the rent is to be 6 per cent. upon the value of the premises, exclusive of improvements; such valuations to be made on August 1, 1906, and every 10 years thereafter, in the manner provided in the leases.

The leases contain the usual covenants for payment of water rates, taxes, and assessments, against assignment without consent of the lessor, for the payment of rent, and for the termination of the lease in case of default of the lessee in complying with the covenants of the lease. Each of the leases contains the following provision:

"And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper cost and charges, keep the building situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean, and tenantable condition and repair during the entire term of this lease."

The leases contain provisions for the insurance of the premises and with reference to the collection and use of the insurance in case of loss. It is provided:

"If said buildings, or any part thereof, shall at any time or times during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in writing, and have the same rebuilt and ready for occupancy within two years from such loss or destruction; and that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for or in re-

spect of said insurance, shall be laid out by it in rebuilding or repairing said building."

The leases also provide:

"That in the event of the determination of this lease at any time before the expiration of the term of 99 years hereby demised, for the breach of any of the covenants herein contained, then and in such case all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor, and no compensation therefor shall be allowed or paid to said lessee."

The leases provide for appraisal at the expiration of the term of the "actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises," and for securing to the lessee reimbursement for such value. It is provided:

"In making said appraisement of the value of said improvements, the appraisers or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have, if vacant."

Upon the execution of the five leases, the lessee, with the knowledge and consent of the lessors, erected the Auditorium Building upon the five parcels of ground covered by the leases. The building is a single structure, and is not separable into parts apportionable to the separate leaseholds. The building was completed about December 1, 1889. In 1891 the Walker and Peck leases were modified. The term in each case was extended for an additional period of 100 years, so that the leases expire on August 1, 2085. The provisions for revaluation were eliminated and a fixed rental provided for the entire term of the leases. It was provided that all the covenants, agreements, conditions, and provisions of the original leases, except as modified by the agreement of 1891, should continue in full force and effect.

The facts, averred in the pleadings and established by the evidence, upon which plaintiff bases its claim for relief in equity, are as follows:

The Auditorium Building was erected before the development of modern steel construction. It is only 10 stories in height. Many more stories are required to produce an adequate return upon the ground value in central districts of cities like New York or Chicago. The Auditorium represents an obsolete type of construction. It has walls of brick and stone resting upon floating foundations. The foundation for a modern steel construction building of the best type should consist of caissons extending down to bed rock. The exterior walls of the Auditorium are what are commonly known as bearing walls, which are constructed of masonry throughout; whereas, the exterior walls of a modern fireproof building of the highest type are known as screen walls, and are supported upon the construction of the various floors, which are in turn supported by steel columns carrying the weight of the entire building. The columns used in the construction of the Auditorium are of cast iron, having lugs with which to support the beams and girders of the floor systems, which are bolted thereto; whereas, the columns in a modern fireproof building of the highest type are built up of structural steel members, which are riveted together and proportioned to carry the load thrown upon them. The beams and girders of the Auditorium have only bolted connections with the columns; whereas, in modern fireproof construction of the highest type, all joints are made with splice plates, lugs, and angles, with riveted connections for rigid fastening and accurate predetermination of the strength and construction.

The engineering formulas now employed in the construction of a modern fireproof building of the highest type state the limitations of the steel stresses and of the strength of materials used, but such formulas were not complied with in the construction of the Auditorium Building, for the reason that they had not been determined. Owing to the lack of experience and lack of precedents, the methods of design and construction actually employed in the erection of the Auditorium, while the best and most advanced known at the date of its construction, were inadequate and improper from a modern point of view.

Since the construction of the Auditorium, the value of the land upon which it is built has increased greatly. The character of the property in its neighborhood has

changed completely. The west side of Michigan avenue is in great demand for large and expensive buildings for hotels, offices, and stores. Upon a 6 per cent. basis, the rents fixed in the leases represent a valuation of $637,500. The present value of the fee of the property in question (exclusive of the building) is more than $3,500,000. The present value of plaintiff's leasehold interest, estimated upon a 5 per cent. basis, is more than $2,000,000. The net excess of the aggregate computed annual rental values on the basis of the above percentage and valuations over the actual rents now payable under the leases is more than $100,000. The rental value of the Auditorium property, unincumbered and unimproved, taken as a unit for building purposes, is substantially greater than the aggregate rental value of the properties taken separately.

There has been a progressive increase of the burden of taxes payable by the lessee. In 1890, the taxes were $22,707.78; in 1923, they were $145,289.23. The operation of the building has not been profitable. Plaintiff has with difficulty been able to pay the ground rent due under the leases, the taxes, interest on bonded indebtednesses, and other expenses of operation, and to retire a small amount of its bonds. If the actual depreciation of the building at the present time is taken into consideration, substantially the only value left with which to liquidate the principal of the bonded indebtedness of $1,375,000, or to return to the stockholders any part of the investment represented by its capital stock, is the value of its leasehold interests, as represented by the difference between the present annual rental value of the fee, unimproved and unincumbered, and the ground rentals accruing from the leasehold interests to the owners of the fee of the property.

In order to secure adequate returns upon the value of the leasehold interests, the present building must be torn down and a new one erected. Such returns can be realized only from a building of greatly increased height, which will provide the maximum obtainable number of floors, with the maximum amount of floor space, and such a building would require a modern steel skeleton structure, supported on caisson foundations, and carried to the maximum height now allowed by law. The present building is now 35 years old and is obsolete in its construction. Its general construction consists of heavy in-

closing walls of masonry, with a skeleton interior construction of cast iron columns and steel or wrought iron trusses. There has occurred a large amount of settlement in the structure, amounting in some places to 22 inches; the maximum of settlement has occurred under the heavy masonry walls, while the skeleton interior construction has, by comparison, settled to a much less extent, and these local differences in settlement have created a distortion in the interior skeleton construction, which has resulted in the fracturing of some of the struts and connections in the framework of the interior construction, and in the cracking of masonry, plaster, and other finished surfaces. By reason of the fact that most of the metal used in the interior construction is iron, further fractures are likely to occur.

Because of fundamental defects in the construction of the building, it will continue to deteriorate, and there is reasonable ground to believe that it will become unsafe. It is impossible for engineers to make a definite forecast as to how many years will elapse before that stage is reached. When that stage of deterioration shall have been reached, it will not be possible to make the building safe and conformable to the municipal regulations, except at a cost so great that the earnings from the building as reconstructed would not represent an adequate return upon the investment. By reason of the fact that the masonry bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas do not afford adequate light for hotel and office purposes; the finishing is old-fashioned and out of date; the elevators are inefficient and inadequate; the plumbing, drainage, and water supply systems are inadequate, antiquated, and unsound; the heating and wiring systems are inefficient. In short, the building has passed into the class of old buildings, which are being torn down in the central district of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected. The highest and best use of the property covered by the leases in suit, at the present time and for many years to come, is one involving the construction of a new building of greatly increased height and capacity. Any building adequate to meet these requirements would necessarily be a modern steel-skeleton structure, carried to

the maximum height now permitted by law and supported on caisson foundations. The cost of such a building would be between $10,000,000 and $15,000,000.

Plaintiff desires and proposes to remove from the Auditorium property the present building, and to erect in its place an adequate, modern steel-construction building at a cost of not less than $10,000,000, adapted for a hotel, auditorium, and safety deposit vaults. Plaintiff has under consideration plans for such a building, and has assurances from financial institutions that, if its right under its leases to remove the old building and erect the new one can be established, the necessary funds can be procured. The purpose of this suit is to establish plaintiff's right, under the covenants and conditions of the leases above described, to tear down and remove the present improvement, as a part of and incidental to the erection of a new improvement of equal or greater value, not impairing in any way the security and property right of the lessors, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement.

The averment of the bill upon which the jurisdiction of a court of equity is invoked to construe the leases is as follows:

"Defendants * * * claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants, and conditions of said leases, even though such removal be incidental to and a part of the erection of a new and better building upon the same property, and even though adequate security be offered and given to protect the lessors from any loss of value to the property which may occur while the old improvement is being wrecked and removed, and before the new improvement is completed; and such defendants claim, and said persons with whom your orator has to deal are fearful, that, under the terms, covenants, and conditions of the leases, if a destruction of the present improvement occurs or is attempted, even though that destruction be incidental to and a part of the act of erecting a new and better improvement on the same property after adequate security as aforesaid shall have been given, it will constitute waste and a ground of forfeiture of the leases.

The aforesaid claims, fears, and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants, and conditions of the leases of said property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests, so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants, and conditions of said leases, in so far as they give color to said claims, fears, and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law. Your orator well hoped that the defendants owning or interested in the fee of said Auditorium property would consent to the replacement of the present building by a new and more valuable improvement so as aforesaid contemplated, which would be manifestly beneficial to all parties interested in said leases; but said defendants, or some of them, have refused to give such consent, or to forego the claims constituting as aforesaid a cloud upon your orator's title, unless your orator would pay them large sums of money, in addition to that which is payable to them by the terms of said leases."

The proof shows that plaintiff undertook to negotiate in a general way with some of the defendants concerning the removal of the old building and the erection of a new one. No definite plans were submitted; no specific demand was made. There was a discussion of the terms of the leases, and defendants and their attorneys asserted that the removal of the old building would be waste, and would be a ground of forfeiture. No concrete act of plaintiff was proposed, and no definite threat of forfeiture was made by defendants.

The answer of Mark Skinner Willing, trustee, *et al.*, states:

"These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants, and conditions of the leases, if they be valid as leases, even though such removal may be incidental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while the old improve-

ment is being wrecked, and before the new improvement is completed."

In the answer of William A. Slater *et al.* it is stated:

"These defendants aver that, if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste, and will give the owners of the land described in said Peck lease, according to the terms thereof, the right to reenter and repossess themselves of such land, free of any and all claims or rights of plaintiff."

The specific relief to which plaintiff claims it is entitled is stated as follows:

"That this court will remove from the several leasehold interests of your orator the above-mentioned claims and clouds, based upon the alleged force and effect of the terms, covenants, and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties, with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises, upon giving proper security as the court may direct, all as a part of the act of erecting upon said premises a new, suitable, and more valuable building and improvement, and one not in any way impairing the security of the lessor in said several leases, or of their assigns and successors; * * * that the court will likewise, upon your orator giving such security as the court may direct for the protection of the defendants herein, enjoin and restrain the defendants' interest in the fee of said properties, as owners or otherwise, from declaring or attempting to declare any forfeiture of any leasehold interest owned or held by your orator, in which said defendants or any of them are interested as aforesaid, on account of any removal or destruction of the building or improvements upon the land subject to said leases; that said defendants may also be enjoined from taking any steps to prevent your orator from tearing down or removing the present building or improvement located upon any leasehold interest now vested in your orator, in which the defendants or any of them are lessors, or the assigns or successors of or interested under the original lessors. * * *"

Referring to the provision in the leases which obligates the lessors to purchase the building at the end of the term, plaintiff, in its bill, makes the following offer:

"In order to remove such question, if any, as may properly arise about the liability of the owners of the fee to purchase and pay for larger or more expensive buildings and improvements than are now upon said properties, your orator is willing and hereby offers, in case of the replacement by your orator of the present building by larger or more costly improvements, to abide by any conditions which to the court shall seem equitable with respect to such provisions, and to waive, if and so far as such waiver shall be deemed by the court necessary or proper, its right and claim under the above-mentioned provisions of said leases to payment at the termination thereof for the said improvements; and your orator hereby consents that any provision to that effect deemed by the court to be conformable to equity and good conscience may be incorporated in any decree entered by the court in this cause."

Plaintiff urges that it has presented a case which entitles it in equity to have its leases construed by the court in accordance with its interpretation of their provisions and to have that construction enforced by the court's injunction.

It is, of course, elementary, that the court is without power to construe these leases, unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. The judicial power may not be invoked upon a prophecy as to future conditions to establish a rule for controlling predicted future conduct. The plaintiff must ask that the defendant be decreed to do something, and, in a court of equity, the appeal must be predicated upon some ground which requires the exercise of the equitable powers of the court. However desirable it might be to have a decision upon the questions relating to the construction of the leases, this court is not empowered to decide abstract propositions, or to declare, for the government of the future conduct of the parties, principles or rules of law which cannot be made effective by the decree of the court upon the issues which are before it. *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, 475, 36 S. Ct. 212, 60 L. Ed. 387; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314, 13 S. Ct. 876, 37 L. Ed. 747; *Prather* v. *Lewis*, 287 Ill. 304, 122

N. E. 470; *Surry Lumber Co.* v. *Wellons,* 129 Va. 536, 106 S. E. 382; *Southern Ry. Co.* v. *Georgia,* 116 Ga. 276, 42 S. E. 508.

There is no modification of the rule just stated in *Pierce* v. *Society of Sisters of Holy Name,* 45 S. Ct. 571, 69 L. Ed. —— (decided June 1, 1925). An act of Oregon (Laws 1923, p. 9), effective September 1, 1926, required parents and guardians to send children between 8 and 16 years of age to the public schools. The Governor and other officers were required to enforce this law. Such enforcement meant the destruction of the private schools, whose owners sought protection against it. The court said:

"But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. * * *"

Has the plaintiff made out a case for relief under the power of a court of equity to quiet titles and to remove clouds upon titles? The remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules, and usages of equity having uniform operation in those courts wherever sitting. Broadly speaking, this equitable jurisdiction is that which was exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the passage of the original Judiciary Act (1 Stat. 73), unless subsequently changed by act of Congress. *Guffey* v. *Smith,* 237 U. S. 101, 114, 35 S. Ct. 526, 59 L. Ed. 856; *Mississippi Mills* v. *Cohn,* 150 U. S. 202, 204, 14 S. Ct. 75, 37 L. Ed. 1052; *McConihay* v. *Wright,* 121 U. S. 201, 205, 7 S. Ct. 940, 30 L. Ed. 932. While the equitable jurisdiction of the federal courts may not be abridged by local law, a federal court of equity may administer an enlargement of equitable rights and enforce and protect rights given by a state statute, when such rights are properly the subject of an equity suit, unless to do so would contravene the distinction between law and equity. *L. & N. R. Co.* v. *Western Union Tel. Co.,* 234 U. S. 369, 376, 34 S. Ct. 810, 58 L. Ed. 1356; *Lawson* v. *U. S. Mining Co.,* 207 U. S. 1, 28 S. Ct. 15, 52 L. Ed. 65; *Devine* v. *Los Angeles,* 202 U. S. 313, 333, 26

S. Ct. 652, 50 L. Ed. 1046; *Greely* v. *Lowe,* 155 U. S. 58, 75, 15 S. Ct. 24, 39 L. Ed. 69; *Holland* v. *Challen,* 110 U. S. 15, 3 S. Ct. 495, 28 L. Ed. 52.

Let us examine the case of the plaintiff in the light of the general usages of equity concerning bills of peace and bills *quia timet,* which control here in the absence of an enlargement of right by the local law. Under the usages of equity, bills of peace are of two kinds:

First. Those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery, asserted by one party and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere, and bring all the claimants before it in one proceeding, to avoid a multiplicity of suits. A separate action at law, with a single claimant, would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each litigant might lead to interminable litigation. To put at rest the controversy, and determine the extent of the rights of the claimants in a common subject, the bill lies, which is thus essentially one for peace. *Sharon* v. *Tucker,* 144 U. S. 533, 542, 12 S. Ct. 720, 36 L. Ed. 532.

Second. Bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. The equity in such a case arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action was founded upon a fictitious demise, between fictitious parties, and a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be embarrassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation, and give repose to the successful party, courts of equity interfered and closed the controversy.

To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must

have been in the possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought that proof of actual possession is necessary to maintain the suit. *Frost* v. *Spitley,* 121 U. S. 552, 7 S. Ct. 1129, 30 L. Ed. 1010; *Holland* v. *Challen, supra.* In most of the states there has been an enlargement of right in such cases resulting from the abolishment of the fictions of the common-law action of ejectment, and the necessity of repeated adjudications at law upon the right of the plaintiff no longer exists, where this new form of action has been adopted. *Holland* v. *Challen, supra.*

It is clear that plaintiff's case, as stated in the bill or made out at the trial, does not fall within either class of bills of peace. It is not a bill of peace of the first class, because the interests of the defendants do not originate in a common source. The alleged controversies arise out of the provisions of five separate and distinct contracts. But, if the bill is treated as one to determine the rights of the claimants of distinct interests in a common subject originating in a common source, the jurisdiction of this court fails. The case was brought here by removal from the state court, on the ground that the alleged controversy between plaintiff and the defendants who removed the case was a separable one. If the case falls within the first class of bills of peace, it has no place here, and should be remanded to the state court. The basis of such a bill is the avoidance of a multiplicity of suits, and, if the case of one defendant is separated from that of the others, the right of plaintiff to appeal for equitable relief is destroyed.

Nor has the plaintiff presented a case for relief under the rules governing bills of peace of the second class. The title of plaintiff is not assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind.

A bill *quia timet,* or to remove a cloud upon the title of real estate, differed from a bill of peace, in that

it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future controversy by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights or interests. To maintain a suit of this character it was generally necessary that the plaintiff should be in the possession of the property, except where the defendants were numerous, and that his title should have been established at law or be founded on undisputed evidence or long continued possession. *Holland* v. *Challen, supra; Lawson* v. *United States, supra.*

Under the general usages of equity, the fact that the interest of the plaintiff is a leasehold estate is not a bar to the maintenance of a bill to remove a cloud upon title, if the suit is in other respects well founded. A lease for a term of years is a chattel real. It conveys an interest in land. While it has some of the attributes of personalty, it is treated in many respects as real estate. *People* v. *Shedd,* 241 Ill. 155, 89 N. E. 332. Bills may be maintained in this court under the general principles of equity jurisdiction to remove clouds upon the title to real or personal property. Judicial Code, § 57 (Comp. St. § 1039); *Jellenik* v. *Huron Copper Co.,* 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647. But such a bill must meet the test of the usages of equity as to what constitutes a cloud upon title, unless some enlargement of equitable rights is found in the local law.

Under the usages of courts of equity adopted by the Constitution and the Judiciary Acts, clouds upon title had a well settled and defined meaning and signification. In *Phelps* v. *Harris,* 101 U. S. 370, 374 (25 L. Ed. 855) the court said:

"The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controvert-

ing it. * * * As to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

It is also the rule, under usages of courts of equity which control here, if there is no enlargement of equitable rights by the state statutes, that a bill to quiet title will not lie to dispel mere verbal or oral assertions of ownership or interest, nor may it be maintained if the same record which must be introduced to establish the title claimed, will show there is no title. *Devine* v. *Los Angeles*, 202 U. S. 313, 332, 26 S. Ct. 652, 50 L. Ed. 1046, citing *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Louisville & N. R. Co.* v. *W. U. Tel. Co.*, *supra*; *Parker* v. *Shannon*, 121 Ill. 452, 454, 13 N. E. 155; *First Congregational Church* v. *Page*, 257 Ill. 472, 100 N. E. 975.

In opposition to the statements of the Supreme Courts of both the United States and Illinois as to the requirements under the general usages of equity for relief under bills *quia timet*, plaintiff invokes *Rector, etc.*, v. *Rector, etc.*, 201 N. Y. 1, 94 N. E. 191. There the court sustained an action to cancel and remove a cloud upon the title to the plaintiff's premises in the nature of a covenant restricting the use of premises to church purposes. There was a state statute which authorized the maintenance of an action to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records the defendant might make, to an estate or interest in real property. The court sustained the bill under both the general powers of a court of equity and the state statute. With reference to the general usages of equity the court said:

"The power of a court of equity may be difficult to define. It is coextensive with the rights of persons to relief. Pomeroy, in his Equity Jurisprudence (volume 1, § 170), says: 'It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are prac-

tically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations.' As applied to titles to real estate, and removing obstacles therefrom, it is the ordinary jurisdiction of a court of equity to perfect and complete the means by which the title, right, estate or interest of parties may be proved or secured, or to remove obstacles which hinder its enjoyment. *Sharon* v. *Tucker*, 144 U. S. 533 [12 S. Ct. 720, 36 L. Ed. 532]."

The opinion in which it was stated that the action could be maintained under general equitable rules as one to remove a cloud upon title, as well as under the state statute, was concurred in by three justices only. In the dissenting opinion, likewise concurred in by three judges, it was said:

"As an appeal to the equity powers of the court, it is necessary that the case shall fall under some recognized head of equity jurisdiction. I know of no branch of that jurisdiction which would comprehend such an action as this. It is asserted, however, that the power of a court of equity 'is coextensive with the rights of persons to relief,' and that the provisions of our code are broad enough for the case. The first assertion is true, only, in a case of equitable cognizance. When a person brings an equitable action, he must maintain it upon some equitable ground. However elastic and discretionary the exercise of the power to grant equitable relief, I do not believe that it can be properly invoked by a party to cancel a covenant in his grant. I am not aware of any precedent and we are cited to none. Though in matters of apparent equity, as fraud or breach of trust, precedents are not necessary, it is dangerous to extend the authority of the court further than the practice of former times. * * * There is no charge of any fraudulent practices or of mistake. * * * The plaintiff is seeking affirmatively to annul, as a cloud upon its title, an agreement which entered into the consideration for the conveyance upon the ground that it was invalid, because unenforceable. If the invalidity of the covenant can be established by extrinsic evidence, then the plaintiff can defeat any action brought to enforce it. Can it be true that it is a cloud upon the title? There is no adverse claim to the property and, whether the restrictive covenant be valid or invalid, * * * how can it create a cloud upon title? If invalid, the defect would, necessarily, appear in any

proceeding by the defendant to enforce it. I do not think that the fact that a defense exists to its enforcement is sufficient to warrant a resort to an equitable action."

The case was decided by the vote of the Chief Justice, who merely concurred in the result, without indicating whether he regarded the general equity powers of the court or the state statute as the proper basis for the action.

The principles stated in *Sharon* v. *Tucker, supra,* do not warrant any such extension of the powers of a court of equity with reference to bills to remove clouds upon title as is set forth in the opinion of the court in *Rector, etc.,* v. *Rector, etc., supra.* The opinion in the former case was by Mr. Justice Field, who wrote the opinion in *Holland* v. *Challen, supra.* In *Holland* v. *Challen* the requirements of bills of the peace and bills to remove clouds upon title are stated, and the limitations are the ones which have been set forth above. In *Sharon* v. *Tucker* it is pointed out that the bill in that case could not be maintained, either as a bill of peace or a bill to remove a cloud. The ground of equitable jurisdiction was the protection of a title not evidenced by any record, but resting in the recollection of witnesses and the warrant for its exercise was found in the ordinary jurisdiction of equity to perfect and complete the means by which the right, interest, or estate of holders of real property—that is, their title—may be proved and secured, or to remove obstacles to its enjoyment. The plaintiffs claimed title by adverse possession. There was no record of their title, and its establishment was dependent upon the recollection of witnesses. The object of the suit was to provide record evidence of the title. The court said:

"The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record."

It was with reference to such a case that the Supreme Court of the United States made the general observation that flexibility of decrees of a court of equity will enable it to meet every emergency. But, of course, the statement was made with reference to cases of equitable cognizance. An equitable action, however broad

and elastic the relief may be, must be maintained upon some equitable ground. And in *Sharon* v. *Tucker* the equitable ground was stated to be one entirely different from that on which bills to remove clouds on title are maintained. The bill in *Sharon* v. *Tucker* was sustained on the same principle as that on which the existence of lost deeds is established in equity. There is nothing in the case which even remotely warrants a modification of the requirements of bills to remove clouds on title as they have been laid down in *Holland* v. *Challen, supra, Devine* v. *Los Angeles, supra,* and other decisions of the Supreme Court. There is nothing in the case which sustains the right to maintain in equity a bill to remove a cloud on title, where the alleged cloud arises from a covenant in the grant by which the plaintiff obtains his interest or estate in the property. An examination of the cases demonstrates that the usages of equity concerning bills to quiet title, as recognized in the federal courts, are correctly stated in the dissenting opinion of Justice Gray in *Rector, etc.,* v. *Rector, etc., supra,* in which three judges concurred, rather than in the opinion of the court, in which three judges only concurred.

The plaintiff, in my opinion, has failed to make out a case under the general usages of equity as to bills to remove clouds on title. The alleged cloud arises out of verbal or oral claims of the lessors concerning the construction of the lease under which plaintiff derives its right to the possession of the premises. If the lease is clearly to be construed as plaintiff claims it should be, then the invalidity of the contentions of the defendants appears from the document which plaintiff introduces to establish its title. If the construction of the lease is doubtful, then the claim of defendants is more than a cloud, and they are entitled to have it tried by an action at law. *Phelps* v. *Harris,* 101 U. S. 370, 375, 25 L. Ed. 855.

Plaintiff's case as a suit to quiet title under the general usages of equity reduces itself to this: Whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract.

Such an action is contrary to the usages of equity and contravenes the fundamental distinction between law and equity.

Having viewed plaintiff's case in the light of the general usages of equity controlling the federal courts, and as if there were no local statute or local law with reference to what constitutes a cloud on title, let us inquire whether or not there is any enlargement of equitable right under the local law which will be here administered. While it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights themselves may be administered by the federal courts as well as by the courts of the state. It is proper to look to the legislation of the state in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have the power to remove.

There are many state statutes of this kind, and it has been said that "an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding." *Holland* v. *Challen, supra.* Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of the parties. *Broderick's Will Case,* 21 Wall. 520, 22 L. Ed. 599. The decisions show that the enforcement of statutes of this type in the federal courts are subject to three restrictions: (1) The case must be within the general class over which these courts are given jurisdiction; (2) a suit in equity does not lie where there is a plain, adequate, and complete remedy at law; (3) in those courts there can be no commingling of legal and equitable remedies, or substitution of the latter, whereby the constitutional right of trial by jury in actions at law is defeated. *Louisville & N. R. Co.* v. *Western Union Tel. Co.,* 234 U. S. 369, 376, 34 S. Ct. 810, 58 L. Ed. 1356, and cases there cited

It is provided by the Chancery Act of Illinois (1 J. & A. Stat. p. 785) that the court may hear and determine bills to quiet title, and to remove clouds from the title to real estate, and bills to establish and confirm titles to real estate or incumbrance thereon, whether the lands

in controversy are improved or occupied or unimproved or unoccupied. The clause, "and bills to establish and confirm titles to real estate or incumbrance thereon," was introduced by an amendment of June 5, 1911. Sess. Laws 1911, p. 253. The power of courts of equity to remove clouds upon title to real estate under the Illinois statute is substantially no broader, under the Illinois statute prior to the amendment of 1911, than it is under the general usages of courts of equity. There are some provisions as to possession and occupation which are not material here. A bill will not lie to remove a mere verbal assertion of ownership in property as a cloud upon title. A cloud upon title is a claim, apparently valid, which may be removed by extrinsic evidence, and equity will not take jurisdiction to remove a cloud on a title, where there is no defect in the title, except what is apparent on the face of the instrument under which the title is derived. *Greenough* v. *Greenough*, 284 Ill. 416, 120 N. E. 272; *First Congregational Church* v. *Page*, 257 Ill. 472, 100 N. E. 975; *Parker* v. *Shannon*, 121 Ill. 452, 13 N. E. 155. "It would be a rather anomalous situation," said the court in *First Congregational Church* v. *Page, supra*, "to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims title."

As to the amendment of 1911, the power conferred upon courts of equity is the power to establish and confirm titles to real estate. While a lease for a long term of years is treated under certain statutes and for certain purposes as real estate, it is essentially a chattel real. A lease, although for a long term, with payments of annual rent, is not a sale, which is a grant of absolute ownership. *Chicago* v. *Tribune Co.*, 248 Ill. 242, 93 N. E. 757; *People* v. *Shedd, supra*. It would be an unwarranted application of this provision to extend it to controversies between a landlord and tenant relative to the construction of the lease. When it is read in its relation to the statute of which it is a part, it is apparent that it cannot have such an application.

Moreover, before this provision will be administered in the Federal Courts, the case which is based upon it must be one over which those courts have jurisdiction. The court will not entertain a case merely for the purpose of establishing a rule for controlling predicted future conduct. Resort to a court of equity must be predicated

upon some equitable ground. A bill to establish and confirm title, if it is to be maintained in this court, must be grounded upon some principle upon which courts of equity grant relief, as was the case in *Sharon* v. *Tucker*, *supra*. Property owners may not rush to a court of equity merely to have it do the work which is ordinarily performed by those who give opinions as to title or who guarantee those titles. The state statutes, as they must be administered here, do not enlarge the equitable rights of plaintiff, so as to permit it to maintain this action, which is not cognizable, as a bill to remove a cloud upon title, under the general usages of courts of equity.

While the bill has been presented as one to remove a cloud from title, it is proper to inquire whether, upon the facts alleged and proved, there is any other ground upon which plaintiff's appeal to a court of equity may be sustained. The plaintiff should not be limited by phraseology in pleading, or by the specific form in which the claim for relief is presented.

The bill may not be sustained as one to enjoin a threatened breach of contract. Certainly an assertion by a lessor that he places a construction upon a lease different from the one which the lessee thinks it should receive is not a breach of the implied covenant of quiet enjoyment. A suit to enjoin a breach of a negative covenant in a contract is governed in the main by the same principles as is a suit for specific performance of an affirmative covenant. If the right is doubtful, relief by injunction is improper, and plaintiff's suit here is based upon the alleged doubts arising from the provisions of the lease. No act of defendants has been suggested which amounts even remotely to a threatened breach of the covenant of quiet enjoyment.

The bill may not be sustained as one to enjoin a forfeiture. No forfeiture has been declared. No cause of forfeiture is stated in the bill. No notice of breach of covenant has been given. The six-months period given plaintiff to cure its default has not even begun.

It is urged that this bill must be sustained upon the broad principles of equity jurisdiction, that plaintiff has no adequate remedy at law, and that the power of a court of equity is coextensive with the rights of persons to relief. In other words, plaintiff invokes the principle that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in equity.

It is true that the absense of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties. But, while this is true, yet the facts of the case must come within some head of equity jurisprudence. When a person brings an equitable action, he must maintain it upon some equitable ground. The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. In other words, there must be a cause of action, whether resort is had to one forum or the other. A court of equity, by avowing that there is a right, but no remedy known to the law, cannot create a right, in violation of the principles of both law and equity. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity; and what wrong have defendants done by merely asserting that they place upon the contracts in question a construction different from that for which plaintiff contends?

The offer to give bond for the construction of the new building, and the offer to reform the provisions of the leases with reference to purchase of the building at the expiration of the terms, do not aid the plaintiff. Rather they emphasize the fundamental infirmity in its appeal for equitable relief. If plaintiff is right in its construction of the leases, it is entitled to tear down the old building and to put up a new one, without giving bond and without submitting to a modification of the leases. If plaintiff's contention is wrong, a court of equity cannot relieve against the obligations of the contracts, in the absence of some element of fraud, accident, or mistake. Equity does not have power to make contracts for the parties which they have not made for themselves.

The bill will be dismissed, without prejudice to the rights of the plaintiff under the leases here involved, when those rights are asserted in any appropriate proceeding.

APPENDIX II.

Opinion of the Circuit Court of Appeals.

Before Alschuler, Evans and Page, *Circuit Judges.*

Evans, *Cir. J.:* This appeal involves solely a question of equity jurisdiction. The district court dismissed the suit concluding that the alleged facts were insufficient to invoke the jurisdiction of a court of equity. It did not pass upon the existence of facts necessary to sustain the relief sought, providing the court had jurisdiction. In other words, two questions were presented to the district court. One was a question of law—the sufficiency of the allegations of the bill to invoke the court's jurisdiction. The other was one of fact—the sufficiency of the evidence to justify the relief sought. Having ruled adversely to appellant on the first question, the district court made no findings on the second question.

It was agreed in this court,—though the briefs are not so limited,—that we should pass on the first question only; and in case we held for the appellant the cause should be returned to the district court, that the issues of fact might be there tried and determined.

Judge Wilkerson, in his opinion (8 Fed. (2), 998), has so well and fully stated the facts as to meet the approval of both counsel. We adopt the statement thus made.

Speaking in a general way, appellant, at the outset of this argument, is confronted by two contentions which it must meet—either one of which, if sustained, will be fatal to the maintenance of this suit. Both of them were upheld by the district court. They are:

(a) The facts as alleged in the bill are insufficient to invoke the jurisdiction of a court of equity.

(b) The bill seeks nothing but a declaratory decree.

Perhaps the two objections are not so unrelated as might at first appear.

Appellee's position under the first objection may be stated in a quotation from *McElroy* v. *Masterson,* 156 Fed. 42:

> "The bill of complaint should be dismissed, unless it can be maintained that there is a comprehensive discretion reposed by modern equity jurisdic-

tion in the chancellor to make and unmake contracts of parties, *sui juris,* constrained only by no other limitations than those which meet the approval of his conscience. Courts of equity are now as much required as courts of law to enforce contracts free from vitiating elements of fraud, and to refrain from making contracts for the parties on which their minds never met.

In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development equity jurisdiction has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable".

To use their own language:

"Long settled rules bound the exercise of equity jurisdiction, and, broad though they are, they do not validate invocation of an unlimited fount of remedies for any and all predicaments. Appellant would expand equity into *arbitrium boni viri,* a conception freely translatable as the decision upon the peculiar facts which would be made by a man of intelligence and good character regardless of settled law. If that system of administering justice ever be accepted, every decision becomes a virtual arbitration, all certainty of lawful rights and obligations is prevented, and constitutional limitations upon the powers of courts are swept away.

"Hence the requirement that a plaintiff must predicate his prayer for relief upon some settled principle or head of jurisdiction constituting the department of equity.

"Observance of these rules affords security and stability to vested rights. Disregard means confusion, uncertainty and, in this instance, unlawful taking of property."

Appellant challenges these limitations to equity jurisdiction, and asserts in the language of Pomeroy—Equity Jurisdiction, 4th Edition, Section 62:

"The whole question by which the extent of the

equity jurisdiction is practically determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate—although the latter inquiry is still sometimes made and treated as though it were controlling,—the question is, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity. * * * A court of equity will not, *unless perhaps in some very exceptional case,* assume jurisdiction over a controversy, the facts of which do not bring it within some general principle or acknowledged head of equitable jurisprudence."

To this statement counsel add their own views of the present litigation:

"While we think there should be no necessity of so doing, we expect to show that if the bill in this case discloses meritorious grounds for equitable relief, there is nothing to prevent the Court, should it prefer that alternative, from accrediting the bill with a conventional name. It may be convenient for ordinary purposes of reservation to have at hand a cabinet of standard labels, but our position is that no such catalogue can deprive equity of its fundamental and most valuable attraction of administering relief according to the exigencies of each case as it arises."

While the opposing counsel thus approach the controversy at issue from different angles, they do not differ widely when they reach the narrow issue here involved.

While it may be, and in most instances is entirely satisfactory and practical to predicate jurisdiction upon our ability to bring the facts within some recognized head of equity jurisdiction, we cannot believe that the doors opening to the courts of equity are numbered, or labeled, or limited. The origin and growth and entire history of equity jurisdiction repels the conclusion that it has ceased to grow, or that only those cases may be recognized which fall within the heretofore existing heads or branches of equity.

Perhaps these foregoing abstract statements have been pursued too far, for, after all it is asserted by appellant's counsel that its cause falls under one of the recognized heads of equity,—namely a bill to remove a

cloud on title. In fact it may be that the so-called enlargement of equity jurisdiction applies more to the rules governing these recognized heads of equity jurisdiction, and to the remedies and the relief obtainable thereunder, than to the general subject of equity jurisdiction.

Further concessions on the part of appellant, that the equity jurisdiction of the district court, from which this appeal is taken, has not been enlarged by any statute of the state of Illinois; that its bill is not a bill of peace, or a bill to relieve from a declared forfeiture, or a bill *quia timet,* or one to enjoin a breach of contract, narrow the issue. In other words, it asserts that while "its right to relief" is "one of substance and not of form", yet if "an old label" must be applied "it is a bill to remove a cloud on title". It asserts that its bill alleges the existence of the three necessary facts which, when present, invoke the jurisdiction of a court of equity: (1) the existence of a substantial property right; (2) present or imminent deprivation of the beneficial use and enjoyment of that right; (3) lack of adequate legal remedy to protect the owner of such right in the use and enjoyment thereof.

Citations of authorities are hardly necessary to sustain the proposition that in a proper case equity will relieve a holder of real estate from the injury or damages which arise from the presence of a hostile or adverse claim. *Holland* v. *Challen,* 110 U. S. 15; *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372.

The objections to the bill as one to remove a cloud on title may be considered under the following four heads:

(a) Appellant's title under the Illinois decisions was not a legal title and, therefore, not susceptible of being clouded.

(b) No hostile or adverse claim is asserted by any appellee, and, therefore, no cloud exists.

(c) Whatever adverse claim or cloud is alleged to exist grew out of the very instrument which constitutes the basis of appellant's title, and being in the same instrument, it is not a cloud of title removable in equity.

(d) If doubt respecting appellant's title exists by virtue of certain provisions of the lease, then appellees' claim is more than a cloud, and the parties must resort to an action at law to determine the same.

(a) Appellant's interest in the real estate involved consists of several leases, some for 198 years and others

for 99 years. Appellees insist that under the Illinois law these leases are chattels (*Chicago* v. *Tribune Company,* 248 Ill. 242; *Thornton* v. *Mehring,* 117 Ill. 55) and do not convey an interest in land. From this fact they argue that equity will not grant relief to a mere holder of a chattel, a lessee for a term of years.

There are two answers to this contention. The first one assumes that appellant's leases are mere chattels, the other assumes they are chattels real, as defined by Judge Wilkerson.

Assuming the leases to be chattels, we adopt the rule announced in many well considered cases and contended for by Pomeroy (Pomeroy's Equitable Remedies, 2nd Ed., section 2151) and hold that equity will take jurisdiction to relieve against a cloud even though the subject matter be personal, rather than real, property.

Suits to remove cloud on title where the property is personal have been repeatedly sustained. *Magnuson* v. *Clithero,* 101 Wis. 551; *Voxx* v. *Murray,* 50 Ohio State 19; *Sherman* v. *Fitch,* 98 Mass. 59; *Martin* v. *Maxwell,* 86 S. C. 1; Pomeroy's Equitable Remedies, Section 369; *Thompson* v. *Emmet Irrigation District,* 227 Fed. 560; *Rosenbaum* v. *Foss,* 4 S. D. 184, 56 N. W. 114; *N. Y. & N. H. Railroad* v. *Schuyler,* 17 N. Y. 592; *Stebbins* v. *Perry County,* 167 Illinois 567.

Precedents rather than logic sustain the distinctions made between real and personal property as the subject matter of suits to remove clouds on title.

This conclusion is, of course, fortified by the fact that the lease under consideration is, after all, a chattel real. It conveys an interest in land, *People* v. *Shedd,* 241 Ill. 155, though for some purposes it may be described as a chattel.

We conclude that appellant's leases form such a substantial property right as entitled it to admittance into a court of equity and to relief therefrom other necessary facts being present. *Johnson* v. *Samuelson,* 82 Neb. 201, 130 A. S. R. 666; *German-American Savings Bank* v. *Gollmer,* (Cal.) 24 L. R. A. (N. S.) 1066.

More serious are the objections (b) and (c) which will be considered together.

It is admitted that the cloud on appellant's title, if any exists, arose out of the same instrument that created appellant's title. That such fact alone robs equity of its jurisdiction, appellant denies.

Decisions are cited which support appellees' contention. We are at a loss, however, to understand why such a rule should prevail. Why must the cloud appear in an instrument other than the one upon which appellant relies for its title? The basis of equity jurisdiction, the reasons which originally, and have since, induced courts of equity to act to remove clouds on title are in no way connected with, or predicated upon the separate and isolated character of the written document that creates the cloud. It may be admitted that removable clouds most frequently appear in instruments other than the one through which complainants trace their title. In fact it no doubt frequently occurs that if a single instrument creates the plaintiff's right and also the so-called cloud, the assertion of the latter *necessarily* casts such doubt upon appellant's title as to require a denial of the relief sought. Particularly is this true where the cloud is found in the granting clause of appellant's title. This was apparently the situation in *First Congregational Church* v. *Page*, 257 Ill. 472, for the court said:

> "It would be a rather anomalous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims."

We are not satisfied that the existence of a common instrument creating appellant's title and appellees' cloud calls for a refusal of a court of equity to act. Rather should the question be determined by an examination of the document to ascertain whether the so-called cloud is one which a court of equity should remove, and also whether the so-called cloud impairs appellant's title or rights, or casts such doubt upon it as to require a denial of the relief sought.

Examining the appellant's muniment of title, its leases, we find that it has an unqualified grant for 99 years, (in most part 198 years), of a right to occupy the land described. In other words, it is given a lease of land located in the heart of Chicago, which property is of large value, and in consideration thereof it is required to pay a large sum of money as rental. The mere grant of the right to occupy the land for a large cash rental gives rise to the inference that the occupants were to use the land rather than to permit it to lie idle. The use of such property in a city like Chicago, and at the date this lease was executed, (the real estate being in the

business district), leaves no room for doubt that such property thus leased was to be used as the foundation for a building, for the use of which rentals were to be collected. While this would be the unavoidable deduction to be made from the execution of the lease, other provisions of the lease conclusively establish the correctness of this deduction.

In the absence of any provision in the lease itself, it is likewise hardly conceivable that a lease for 198 years, or even one for 99 years, should be so construed as to deny to the lessee the right to rebuild as changing conditions require.

It may be conceded that modern structures are more or less permanent. They are more so now than in 1887 when the leases were executed. But the changes in the building art in the last forty years, of which the court can and will take judicial notice, justify the conclusion that permanency in buildings is but a relative term, and particularly so in a city like Chicago.

In short, appellant shows it possessed valuable rights; that their existence was neither doubtful nor uncertain; that the enjoyment of these rights was possible only through the use of the rented ground as the site for a building; that the location of the property, its large value, the size of the rentals, and the taxes conclusively negative the possibility of the lease being executed save for commercial purposes. And it then follows, as an unavoidable deduction from the grant for a lease for 198 years, that the building or buildings which were to be constructed thereon should, from time to time, be repaired, and at *some time* during the existence of the lease be *replaced* by new buildings.

Appellant alleges that it is unable to rebuild because of the cloud on its title occasioned by certain provisions in the lease, and the appellees' position in respect to such provisions. It seems to us that appellant, in making these allegations, has gone far toward establishing its right to have a court of equity hear the evidence.

Appellees insist that there is no cloud on appellant's title; that no verbal position taken by any of them can create a cloud removable in a suit of this character. It further contends that if this position is not sound, then the so-called cloud is not such a one as the law contemplates, but instead throws such doubt on appellant's claim as defeats its right to bring this suit.

First let us consider the nature of the alleged cloud and then determine whether it comes within the legal definition of a cloud on title.

Bearing in mind that the enjoyment of this lease is dependent upon appellant's right to build a structure of suitable size and character to meet the needs of the community, it is apparent that appellant must finance the cost of such a building. To do so, it must have an unhampered entrance into the money market. To raise fifteen or twenty millions of dollars, the builder's title must not only be free from doubt but free from the suspicion of doubt. A cloud on title is a relative term. What may be passed as merchantable under certain conditions would be rejected under different circumstances.

But no examiner of title could, or would, have the temerity to urge that a provision against building, or a provision which an adverse party insists is against rebuilding, casts no cloud on the title of a 198 year leasehold. And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile assertion by an adverse claimant, be the basis of a cloud on title.

What then are the requirements of an adverse claim that will make it a cloud on title, as that term is used in courts of equity in suits of this character? What is the cloud of which appellant complains?

Upon the first question the decisions may be divided into the strict and the liberal holdings. From the latter, which we are inclined to follow, we conclude that a hostile or adverse claim becomes a removable cloud if it impairs the merchantability of appellant's title, materially affects the marketability of appellant's property, or defeats or impairs the legitimate use and enjoyment of appellant's property, which includes its right to construct a suitable building thereon, so that the maximum rental may be secured. The following are a few of the many decisions available. *McArthur* v. *Rubber Co.* (Mass.) 109 N. E. 162; *Witt* v. *Sims* (Ga.) 78 S. E. 467; *Johnson* v. *County* (Mont.) 146 P. 471; *Hawes* v. *Clarke*, 144 N. Y. S. 11; *Deckenbach* v. *Deckenbach* (Ore.) 130 P. 729; *Campbell* v. *Disney* (Ky.) 18 S. W. 1027; *Kittle* v. *Bellegarde* (Cal.) 25 Pac. 55; *Palmer* v. *Yorks*, (Minn.) 79 N. W. 587; *Pacific Coast Pipe Co.* v. *Hedican* (Wash.) 112 Pac. 655; *Bird Timber Co.* v. *Snohomish County*

(Wash.) 152 Pac. 689; *Fox* v. *Williams* (Wis.) 66 N. W. 357; *Broderick* v. *Cary* (Wis.) 74 N. W. 95.

In *McArthur* v. *Hood Rubber Co., supra,* the court says,

> "Whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest and he cannot immediately protect or maintain his right fully and completely by proceedings at law, then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties."

It is true that many of these decisions (though not the Massachusetts case) are under statutes that are broad and inclusive in their language. Doubtless these statutes have had a large influence in determining the character of a hostile claim removable as a cloud on title. But whether the causes be traced to these statutes, or, as in the Massachusetts case, to the necessities of society, courts have given to an adverse or hostile claim a definition far more inclusive than the one which obtained several decades ago.

Appellant also alleges that appellees take the position that the clauses deny to the appellant the right to replace the present building with a new and modern structure. It is not contending that appellee's verbally stated position alone constitutes a cloud. It is appellees' position respecting the lease, this written document of record, (which position is manifested by oral pronouncement, and by their refusal to consent to the rebuilding) *in addition to the clauses,* that creates the infirmity in appellant's asserted right and defeats, or at least impairs, its enjoyment of its lease.

It seems to us that this constitutes a removable cloud on title.

Plaintiff's right must be clear. But the certainty of such right must be determined in the first instance by the allegations of the bill, (unless they charge conclusions or facts from which different conclusions are unavoidable), and not by the facts which ultimately may develop when the Chancellor hears the evidence. There is nothing illogical or fatally weak in appellant's allegations that this clause, together with appellees' stand under it, impairs its ability to finance the undertaking, without which it cannot rebuild.

may tear down your building, in which case an action at law will be brought against you, and if your contentions are not upheld, you will be ousted, and all you have invested will be lost? True, this court cannot make contracts for the parties. It cannot remake leases for competent parties who have contracted. But it can, and does, say that plaintiff's remedy at law is not adequate when it must stake its entire investment, risk loss of its leasehold perhaps, as a condition upon which it may judicially ascertain its legal rights.

In determining whether appellant has an adequate remedy at law, it is important to bear in mind the word "adequate."

Complainant may have redress at law but such remedy may nevertheless be inadequate. 10 R. C. L. 275; *Haines* v. *Trueblood et al.* (Ind.) 119 N. E. 382; *Union Pac. R. R. Co.* v. *Weld County*, 247 U. S. 282-285, 286.

It has been held that a remedy at law is inadequate unless it be in the control of the party seeking relief. Delay alone may furnish sufficient justification for a successful appeal to equity, and delay is unavoidable and its duration uncertain where a resort to legal redress is dependent on the action of an adversary. *Fredenberg* v. *Whitney*, 240 Fed. 823; *Bank of Kentucky* v. *Stone*, 88 Fed. 383.

The rule is stated in *Fredenberg* v. *Whitney* thus:

> "In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners."

In the present suit, it is true, appellant may provoke appellees to action. It may so act as to give each of them a right to institute an action in law. But such a course will occasion vexatious and unavoidable delays due to the number of actions that must be instituted and tried.

Throughout this opinion we have endeavored to avoid its undue prolongation by an analysis of the numerous decisions cited which bear upon the legal questions in-

volved. The decisions are without number that deal with the question of equity jurisdiction. It would be a hopeless task to attempt to analyze each one or even to satisfactorily reconcile them. Two cases, however, deserve special attention for, if it be necessary to fortify or sustain our conclusions by judicial precedents, then these decisions merit citation. The two cases are *Rector* v. *Rector,* (N. Y.) 94 N. E. 191 and *McArthur* v. *Hood Rubber Co.* (Mass.), 109 N. E. 162.

Both cases are authority for the conclusion here reached that a removable cloud on title may arise in the instrument through which plaintiff traces its title. They also support the position that a negative covenant may constitute a removable cloud on title. Both opinions are vigorously assailed. The Rector decision, it is argued, was by a divided court; and it is contended that the McArthur case was later overruled by the same court.

The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accordable to opinions of the majority of divided courts.

We appreciate that this decision may well be called an advanced one. ("A novel one" 2 Harvard Law Review 543.) Its persuasiveness, however, lies not in its isolation or in its uniqueness, but in its appeal to conscience.

We do not agree that the decision in the McArthur case was overruled by the *Riverbank Improvement Co.* v. *Chadwick* (Mass.) 117 N. E. 244. The issues were different in the two cases.

In this opinion we have refrained from stating appellees' fact position regarding this clause in the lease. We have done so for the reason that we are not concerned with the controverted facts bearing on this issue. We want the district court to know that we have not in any way intimated our views respecting these facts, or the persuasiveness of the facts on either side. Our sole question is to determine whether a court of equity should take jurisdiction of the suit. The trial court must determine whether the facts justify the relief sought. And its approach to this question should be uninfluenced by anything we may have said on the legal question here under consideration.

MORTGAGEES.

The trust company representing the bondholders has a lien in the building and it has joined the fee owners in objecting to the court's jurisdiction.

There is no controversy as to the existence of such mortgage, and the legal question it presents can not be ignored. Mortgagee asserts its position to be one with vested rights that cannot be disturbed without its consent. But in what is the mortgagee interested? Wherein is it prejudiced? It is interested in its lien—nothing more. Its lien covers the leasehold to the extent of about $1,250,000.00. The building in question adds to its security, hence, its interest. But it is in the security, nothing more, that it is interested.

While it is hard to see how its security may be impaired, yet, relying on the letter of its bond, it asserts that the security may not be changed without its consent.

But, if appellant's position is correct, the mortgagee took its bonds subject to appellant's right to replace the present structure with a new one. If the right to rebuild is an implied right rising from the grant of a 198 year lease, wherein has a mortgagee any legitimate complaint if the mortgagor does rebuild, and as here, offers to deposit a bond or cash to protect the mortgagee.

Appellant's right to maintain the suit is predicated upon its implied right to rebuild, which arises from the grant of a 198 year lease. Such right, if it exists at all, appeared in the recorded title of the mortgagor when the mortgage in question was executed. Mortgagee cannot now complain of the exercise of a right of which it had notice. Particularly is this so where, as here, the mortgagee offers cash or bond security in twice the amount of the mortgage during the period of construction, or until such time as the court fixes.

If the trial court, upon trial of the issue of fact, ultimately determines that appellant has no right to replace the Auditorium building with a new structure, then, of course, the mortgagee's objection to its so doing will be sustained.

This brings us to the second objection advanced by appellees.

Does appellant ask merely for a declaratory decree construing its lease and establishing its rights thereunder?

Many cases have been cited (*Muskrat* v. *United States*, 219 U. S. 346; *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308) and many others might be added, holding that a court is empowered to hear only actual controversies. They cannot pronounce declaratory decrees which decide abstract propositions for the future guidance of parties interested. But if the instant suit is properly cognizable in a court of equity,—one to remove a cloud on title,—and we hold that it is,—it may be maintained and is distinguishable from the above cited decisions upon which appellees rely.

We cannot close this opinion without expressing our appreciation of the particularly able and helpful briefs which counsel for both sides have submitted.

The decree is reversed with direction to the district court to hear the evidence and determine the issues involved.

FILED
FEB 13 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

BRIEF FOR PETITIONERS.

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INDEX.

PAGE

Opinions of the lower courts..... 1
Judgment and orders to be reviewed..... 2
Jurisdiction of the court..... 2
The issues and errors:
(a) As to equity jurisdiction..... 3
(b) As to federal jurisdiction..... 4
Statement of the case..... 4

Points and authorities..... 19

(A) *As to Equity Jurisdiction.*

The Circuit Court of Appeals erred in holding "The Instant Suit Is Properly Cognizable in a Court of Equity" as "One to Remove a Cloud on Title"..... 19

I. The substantive law of the State of Illinois, and none other, is applicable to determine the respondent's title or whether the title is clouded. 20

II. Decisions of the highest court of the State of Illinois hold that doubtful provisions in an owner's muniment of title, coupled with oral hostile assertions as to said provisions by an adverse claimant, do not constitute a cloud upon that title..... 21

III. The decision of the Circuit Court of Appeals, holding that doubtful provisions in the respondent's muniment of title, coupled with the position of the petitioners based thereon and manifested only by oral statements, constitute a cloud upon title, is in conflict with the property law of the State of Illinois..... 24

IV. The relief sought by the respondent, which the Circuit Court of Appeals erroneously holds is proper, is an adjudication of its own title by the process of construing its leases and declaring the rights of the parties thereunder 27

V. The case set up by the respondent is not embraced within any principle or head of equity jurisprudence, and is an application for a declaratory decree not within the judicial function 30

VI. As a bill to declare rights under the leases, the exercise of jurisdiction would be particularly erroneous because a court of equity is called upon to declare and adjudicate a plaintiff's title to realty..... 33

(B) *As to Federal Jurisdiction.*

The petitioners were wrongfully prevented from litigating in the courts of the State of Illinois by the erroneous refusals of the federal courts to remand the case to the state court.. 35

I. There is no separable, removable controversy unless there is a separate and distinct cause of action as to the defendants seeking removal, which can be decided as between said defendants and the plaintiff in the absence of all other defendants..... 37

II. It becomes the duty of a federal court, at whatever stage of litigation it discerns that federal jurisdiction is lacking in a removed case, to remand it to a state court..... 38

CONCLUSION 39

Table of Cases Cited.

	PAGE
Ayres v. Wiswall, 112 U. S. 187	37
Bass v. Metropolitan W. S. E. R. Co. 82 Fed. 857	4
Blake v. Pine Mt. Iron & Coal Co. 76 Fed. 624	32
Boykin v. Morris Fertilizer Co. 257 Fed. 827	38
Buckner v. Carr, 302 Ill. 378	23
Clark v. Smith, 38 U. S. 195	20
Devine v. Los Angeles, 202 U. S. 313	25
First Congregational Church v. Page, 257 Ill. 472	23, 25, 26
Foote v. Yarlott, 238 Ill. 54	37
Fraser v. Jennison, 106 U. S. 191	37
Frost v. Spitley, 121 U. S. 552	33
Gibson v. Holden, 115 Ill. 199	37
Glos v. People, 259 Ill. 332	23
Graves v. Corbin, 132 U. S. 571	38
Greenough v. Greenough, 284 Ill. 416	22
Guffey v. Smith, 237 U. S. 101	20
Hansen v. Pacific Coast Asphalt Cement Co. 243 Fed. 283	38
Holland v. Challen, 110 U. S. 15	20
Ingals v. Plamondon, 75 Ill. 118	37
Ingle v. Jones, 69 U. S. 1	32
Lawson v. United States Mining Co. 207 U. S. 1	29
Liberty Warehouse Co. v. Grannis, 273 U. S. 70	33
Louisville & Nashville R. R. Co. v. Western Union Telegraph Co. 234 U. S. 369	33
McCarty v. McCarty, 275 Ill. 573	21, 30
Minnesota v. Northern Securities Co. 194 U. S. 48	38
Muskrat v. United States, 219 U. S. 346	30

New Jersey v. Sargent, 269 U. S. 328.....30, 31

Paine v. Doughty, 251 Ill. 396..... 33
Parker v. Shannon, 114 Ill. 192; s. c. 121 Ill. 452..... 22
People v. Shedd, 241 Ill. 155..... 20
Phelps v. Harris, 101 U. S. 370.....29, 33
Postal Telegraph Co. v. Western Union Tel. Co. 155 Ill. 335 32
Prather v. Lewis, 287 Ill. 304..... 33
Pusey & Jones Co. v. Hanssen, 261 U. S. 491..... 20

Rigdon v. Shirk, 127 Ill. 411..... 23

Seeley v. Baldwin, 185 Ill. 211..... 33
Sheets v. Seldon, 7 Wall. 416..... 32
Springer v. Darlington, 207 Ill. 238..... 37
Steele v. Drummond, ... U. S. .....; 48 S. C. Rep. 53 3
Subirana v. Kraemer, 17 Fed. (2nd) 725..... 29

Thomas v. Delta Land & Water Co. 258 Fed. 758.... 38
Torrence v. Shedd, 144 U. S. 527.....37, 38

United States v. Alaska Steamship Co. 253 U. S. 113 30
United States v. Hamburg-Amerikanische Co. 239 U. S. 466 30

Warren v. Warren, 279 Ill. 217..... 23
Wehrman v. Conklin, 155 U. S. 314.....29, 33, 34
Wilson v. Oswego Township, 151 U. S. 56..... 37

STATUTE CITED.

"The Removal Act," Sec. 71, Chap. 3, Title 28, United States Code (formerly Sec. 28 of Jud. Code as Amended, Act Jan. 20, 1914, c. 11).....15, 35

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Petitioners,

v.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This cause comes before the court upon writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, granted November 21, 1927. (R. 668.)

Opinions of the Lower Courts.

The opinion of the Circuit Court of Appeals is reported at 20 Fed. (2nd) 837. It is also found in the record at page 595, and is set forth as Appendix II at page 51 of our petition for writ of certiorari heretofore filed in this court.

The opinion of the District Court is reported at 8 Fed. (2nd) 998. It is also found in the record at page 542, and is set forth as Appendix I at page 29 in said petition for writ of certiorari.

Judgment and Orders to Be Reviewed.

The judgment to be reviewed is that of the Circuit Court of Appeals, entered June 7, 1927, at record pages 610-611. This judgment reversed the decree of the District Court entered January 30, 1926 (R. 563), and remanded the case for further proceedings in compliance with the appellate court's opinion.

The court also is asked to review an order of the Circuit Court of Appeals, entered August 30, 1927, (R. 664), denying the motion (R. 635) of these petitioners to remand the case to the state court whence, we said, it had been improperly removed. That motion was a repetition of similar motions made by these petitioners, and overruled, in the District Court before the trial (February 2, 1925; R. 194-7).

Jurisdiction of This Court.

The Supreme Court of the United States has jurisdiction of this cause under former Section 240 (a) of the Judicial Code as amended, now Section 347 of Title 28, United States Code of Laws in force December 6, 1926.

The Issues and Errors.

The claims advanced, and the rulings made, in the Circuit Court of Appeals, which are relied upon as the basis of this court's jurisdiction, present questions of (a) equity jurisdiction, and (b) federal jurisdiction.

No other issue in the case has been decided below, and, under (1927) *Steele* v. *Drummond*, ... U. S. .....; 48 S. C. Rep. 53, no other issue may be presented.

(a) Equity Jurisdiction.

1. The petitioners contended that equity jurisdiction was lacking because the case made by the respondent as plaintiff does not present the essential elements of a justiciable case or controversy, and is a mere application for a declaratory judgment or decree. (R. 137; R. 160; R. 621.)

The respondent thereupon claimed, and the Circuit Court of Appeals has held, that the bill of complaint was not an application for a declaratory decree because it is sustainable in equity as a bill to remove clouds from title.

To reach that conclusion, the Circuit Court of Appeals, overruling the petitioners' contention that no cloud upon title exists, decided an important question of local law in a way in conflict with applicable local decisions in that said court has decided certain facts do constitute a cloud upon title to Illinois realty, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The petitioners further contended (R. 169-172, 617-621 and elsewhere in briefs), but the Circuit Court of Appeals by its opinion denies (R. 600 *et seq.*), that equity jurisdiction was lacking because the respondent's bill is an application for a court of chancery simply to construe the respondent's own muniment of title and thereby unlawfully to adjudicate in equity the respondent's own doubtful title.

The Supreme Court and other Circuit Courts of Appeals have held equity has not such jurisdiction.

3. The petitioners further contended (R. 165-172) that the respondent asks the court to make new contracts between the parties. The District Court's opinion sustained this contention, but the Circuit Court of Appeals considered otherwise.

Courts of equity of the United States have no such power.

(b) Federal Jurisdiction.

The petitioners contended that federal jurisdiction was lacking because the case was wrongfully removed from the state court to the federal courts, in that citizens of the same state are plaintiff and defendant and no separable controversy exists as to the removing party.

The Circuit Court of Appeals wrongfully denied the petitioners' motion to remand, as is provided for in the Removal Act.

Statement of the Case.

Chicago Auditorium Association, the respondent, commenced this lawsuit on June 13, 1923, by the filing of its bill of complaint (R. 3) in the Circuit Court of Cook County, State of Illinois. Defendants other than these petitioners procured its removal to the federal courts, where all proceedings have transpired.

The petitioners are owners of some 80 per cent of the ground upon which the nationally-known Auditorium Building in Chicago is situated. The petitioners also own that portion of the building situated on their fee. (*Bass* v. *Metropolitan W. S. E. R. Co.*, 82 Fed. 857.) The remaining 20 per cent is owned by other parties who, like these petitioners, were made defendants below.

The respondent is the tenant of the property under written long-term leases.

The litigation arises from the desire of the tenant to tear down the building and to erect on the land a wholly different building adapted to commercial purposes, all without our consent and without the consent of other landlords and a mortgage trustee.

Chicago Auditorium Association is an Illinois corporation (R. 3), organized in 1886 for the purposes of constructing and maintaining a building in Chicago, to contain a large auditorium and to provide facilities for cultivation and promulgation of the fine arts, and the like. In 1887, the Association leased five adjacent tracts of land in the business district of the city under five substantially similar indentures for 99-year terms. (R. 34, 51, 68; and see R. 10.) Exhibits 2 and 4 (R. 34 and 51) are copies of those leases made with these petitioners' predecessor as lessor, covering two tracts, each tract being about 40 per cent of the total ground area. In 1891, the terms of three of the leases, including our two, were extended 100 years. (R. 48, 65, 85.)

On the five tracts, the Association, pursuant to prearranged plans (R. 223) and covenants in its leases (*e. g.*, R. 34-5), erected during the years 1886-7-8 the present monumental Auditorium Building—an edifice of such note that both the president and the vice president of the United States attended its dedication. (R. 248.) Its walls enclose a 300-room hotel, many offices and studios, a recital hall, and one of the world's finest auditoriums. (R. 247-251.)

In the course of promotion and construction, the association conveyed its leaseholds to Illinois Trust & Savings Bank, an Illinois corporation (now Illinois Merchants Trust Company), as trustee to secure two bond issues aggregating par of $2,500,000 (R. 15-16), of which

some $1,375,000 are still outstanding. (R. 205.) The two trust deeds (R. 202-205) are not released, and the trustee is a party defendant to the bill of complaint.

The building has served and continues to serve well the institutional purposes for which the Association was organized (R. 3) and financed. (R. 391.) There has been no failure of the Association to pay its rent or taxes or similar fixed charges. So far as the landlords and the bondholders or trustee are concerned, no complaint of any nature has ever been made. However, newcomers, unconcerned with the civic aspirations which fostered the Auditorium enterprise, have recently acquired control of its capital stock (R. 245, 259), have changed its chartered purposes (R. 199; 4), and have proposed, if the courts would help them (R. 239), to tear down the Auditorium Building in order to replace it with a commercial skyscraper from which they "would get a benefit, a large revenue". (R. 258.)

It was and is and must be admitted by everyone that the leases and the trust deeds do not *expressly* grant to the Association, as tenant and obligor, the right to tear down and remove the existing building under any circumstances whatsoever, even to rebuild. Whether, under any and all the provisions of the leases and of the trust deeds, that right was conveyed *impliedly* called for the answer, as respondent itself states (R. 29) to "a *question* which, as between your orator and the defendants owning or interested in the fee, * * * presents a common issue of law and fact substantially identical with respect to the interests of the said several defendants". The *answer* to the question lay and still lies in the meaning and effect of the leases and the trust deeds. No other instrument of grant or limitation exists.

Counsel for the Association, when consulted by its pres-

ident, gave a qualified opinion (R. 241) that upon certain conditions it might tear down and replace the building. However, the Association's counsel deemed it advisable to obtain unanimous consent to the program, and the views of the landlords and of the securityholders became important. The task of sounding them out fell upon Mr. R. Floyd Clinch, the president.

No approach ever was made to the mortgage trustee prior to the filing of this suit; but, when made a defendant, the trustee appeared and vigorously resisted the Association's claims. (R. 104, 135, 143.)

In September or October of 1921, President Clinch while on a railroad train chanced to meet Mr. Mitchell D. Follansbee of Chicago, whom he knew to be counsel for one set of fee owners. These were the owners of only one of the five tracts, constituting about 10 per cent of the total area under the Auditorium. They were and are all residents and citizens of the states of New York and Massachusetts (R. 112-116), and are known in this record as the Sears-Slater trustees, successors in title to the Pecks as lessors under Exhibits 6 and 7. (R. 68 and 85.) The conversation between President Clinch and Mr. Follansbee (R. 240-1) was quite casual and, naturally, noncommittal on the part of Mr. Follansbee who previously had not heard of the Association's new project.

Nothing more appears for about seven months. Then, on May 27, 1922, President Clinch, with his counsel, met some of the Sears-Slater trustees in Chicago, and he laid before them the proposition of buying their fee or of paying more rent for the right to tear down and rebuild. (R. 241-2.) The conference was informal and friendly. It ended in a probable understanding that the Association would buy the Sears-Slater fee for $350,000

if some equally satisfactory arrangement could be made with these petitioners (R. 242), "the Willing interests".

Again, the following morning, these same men met with counsel for the Sears-Slater trustees. (R. 242.) Nothing was done; and little was said except that the deal discussed the previous evening might as well await similar negotiations with the Willing interests.

Up to this point, the Willing interests, *i. e.*, these petitioners, had not been brought into the negotiations. A month or so later, President Clinch called, "sat down and had a discussion". (R. 242.) He mentioned the negotiations with the Sears-Slater trustees and said any satisfactory deal called for an agreement with the Willing interests. "Mr. Willing seemed to think that he didn't know whether he cared to sell; that he disagreed with me as to our ideas of right to reconstruct without consent, but * * * might sell for $1,500,000." (R. 242-3.) President Clinch said that was out of the question, and that if they "could not come to any closer terms I presumed the only thing to do would be to bring a friendly suit in equity. Well, [Mr. Willing] said he guessed that was the only thing that could be done. * * * I do not remember more in detail just what Mr. Willing said about disagreeing with me on the right to tear down the building. He said they had also consulted attorneys and his conclusions were arrived at after advice from his attorneys that we did not have the right to tear it down." (R. 243.)

The above conversation is elaborated somewhat under questioning by Judge Wilkerson (R. 253-5), but nothing here material was added. The foregoing is the version given by President Clinch. There was no threat of any kind by these petitioners; all was oral, friendly, informal and, at most, evidenced a divergence of opinion as to the

legal effect of the leases—a divergence which was quite incidental to discussion of possible sale and purchase of the Willing fee.

In none of the conferences did President Clinch mention the giving of security to protect the landlords during the proposed periods of demolition of the present building and of the construction of his projected new one. Nor did he mention waiving the tenant's right to receive from the landlords the appraised value of the building on the premises at the end of the term of the letting. These so-called offers to do equity made their debut in the bill of complaint. (R. 28, 30.) Indeed, the proposition urged by respondent in its bill of complaint for decretal enactment never was submitted in like terms to any landlord prior to suit.

This one private conference includes literally everything done or said by these petitioners to "cloud" respondent's title. If other persons, such as investment bankers with whom respondent ever chose to deal, later learned of the Willing interests' position, they did not learn it from the Willing interests.

No other or further negotiations were attempted. After a tranquil year, this suit was commenced by the Association.

After alleging that the building has become obsolete in design, incapable of alteration without unjustifiable expense, and unprofitable in operation, the Association averred that the highest and best use of the property for the financial gain of the tenant would be its replacement by a modern skyscraper adapted to commercial purposes. (R. 257-8; 364.) Nevertheless, continues the bill (R. 28; also at R. 239), "the defendants * * * or some of them" "claim and assert, and by reason of such claim and assertion" bankers asked to finance the proposed new un-

as defendants to the bill, made motions to dismiss under Equity Rule 29. (R. 137.)

On April 18, 1924, Judge James H. Wilkerson, District Court Judge, overruled the motions to dismiss (R. 140), but he simultaneously filed his "Decision On Motion To Dismiss" (R. 140), stating that the points urged in support of the motion could be pressed after the testimony had been taken. Thereafter the petitioners answered (R. 160), preserving the points of equity (R. 169-171) and federal (R. 164) jurisdiction. Much evidence was received, for under the conditions thus imposed both sides went into the factual issues. The petitioners made objections to the reception of all evidence (R. 201-2) inconsistent with their contentions as to jurisdiction, but the objections were overruled. (R. 202.)

The testimony tended to show that the building, though designed and erected by respondent, had become obsolete; that the environment had changed, though admittedly for the better; that operation always had been financially unprofitable, though profits had never been seriously anticipated (R. 391); that by reason of settlement of the floating foundations, some structural distortion had resulted and might again result, though settlement had virtually ceased; and that increasing maintenance costs, taxes and the like caused the Association to be alarmed about future ability to meet its obligations.

These matters are set forth at length in Judge Wilkerson's opinion; for they had been stressed by the respondent as having some general bearing upon the ability of a chancellor to grant relief. The petitioners' general objection to this kind of testimony was supplemented by the further point that hardship, if any, not attributable in the slightest degree to us, failed to sanc-

tion equity jurisdiction to grant a construction or an alteration of the leases which might alleviate such condition.

On December 7, 1925, the trial judge made his decision (R. 542) which, in effect, sustained the petitioners' motion to dismiss. Judge Wilkerson declared the bill of complaint not sustainable as a bill to remove clouds from title because no cloud existed, and not sustainable under any other principle of equitable relief. On January 30, 1926, a short decree dismissed the bill "for want of equity jurisdiction to grant any relief upon the pleadings and evidence, but without prejudice to whatever rights the plaintiff may have under the leases here involved when asserted in any appropriate proceeding or otherwise". (R. 563.)

An appeal was taken by Chicago Auditorium Association (R. 568; Feb. 9, 1926) to the Circuit Court of Appeals for the Seventh Circuit, which, on June 7, 1927, entered judgment (R. 611) reversing the decree and remanding the case to the District Court with directions to hear the evidence and determine the issues involved. Rehearing prayed by these petitioners (R. 613) was denied on August 30, 1927 (R. 664), but mandate was stayed (R. 665) for the filing of a petition for a writ of certiorari in the Supreme Court. That petition was filed, and, on November 21, 1927, this court granted the writ. (R. 668.)

The Circuit Court of Appeals holds flatly that "the instant suit is properly cognizable in a court of equity" as "one to remove a cloud on title". (R. 608.) The cloud is described as follows:

> "And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if ac-

> complained by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title." (R. 602.)

That is to say, the Circuit Court of Appeals here holds that a peaceful difference of opinion between two contracting parties as to the meaning and effect of their leases under which one as the tenant occupies and uses realty owned by the other, evidenced entirely by conversations between themselves, clouds the tenant's title to an extent and in a manner sanctioning judicial intervention to "remove" such "cloud".

To reach that conclusion, and particularly its conclusion as to what constitutes a cloud upon title, the Circuit Court of Appeals completely ignored the many decisions of the Supreme Court of Illinois holding that a title is not clouded by oral hostile assertions of opinion as to the construction of provisions in the instrument under which a plaintiff claims his own title. The Circuit Court of Appeals omits adequate explanation for its decision thus conflicting with local law. And in remanding the case, the Circuit Court of Appeals fails to inform the trial court what to remove as a cloud or how to remove it, though respectfully requested to do so. (R. 617.) Likewise, said court fails to explain its avoidance of decisions of the Supreme Court of the United States and of other Circuit Courts of Appeals, holding that a court of equity has not jurisdiction simply to construe a plaintiff's own muniment of title for the primary purpose of adjudicating the plaintiff's own title. And the Circuit Court of Appeals responds to our contention—that the respondent simply seeks a declaratory decree—by saying the bill is properly cognizable as one to remove a cloud on title. (R. 608.) We think that the bill is not properly so cognizable, and that, therefore, the

theory upon which the Circuit Court of Appeals sustained equity jurisdiction is erroneous.

Had the case been decided in an Illinois court, your petitioners believe compliance with Illinois substantive law would naturally have brought about a result directly contrary to the lower court's reversal. Your petitioners believe that both the United States District Court and the Circuit Court of Appeals wrongfully persisted in retaining federal jurisdiction under the Removal Act. Twice these petitioners have attempted to have the case remanded, but in vain.

The original bill of complaint was filed in the Circuit Court of Cook County, an Illinois state court, by an Illinois plaintiff. Its removal to the federal court was procured upon petition of the defendant Sears-Slater trustees, owners of one fee, not citizens of Illinois. Their petition (R. 112) recites the diversity of citizenship and avers a separable controversy between the Illinois plaintiff and said Sears-Slater trustees as defendants.

After removal, these petitioners filed in the District Court their motions to remand to the state court (R. 194-5) on the grounds that no separable controversy under Sec. 71, Chap. 3, Title 28, United States Code, (formerly Sec. 28 of Jud. Code as amended, Act Jan. 20, 1914, c. 11) exists. The pertinent provisions are:

> "Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, may be removed by the defendant or defendants therein to the district court of the

> United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *"

The motion was overruled in the District Court (R. 196-7) without opinion.

Again in the Circuit Court of Appeals by leave the motion was renewed (R. 635) and again was overruled without comment. (R. 664.)

The lease of the Sears-Slater trustees with the respondent and the two leases of your petitioners with the respondent are identical in all relevant provisions. (R. 34, 51, 68.) The respondent's bill of complaint itself declares the question to be decided is "a common issue of law and fact substantially identical with respect to the interests of the said several defendants". (R. 29.) It also says that the five tracts of land form one contiguous area covered by "one entire building". (R. 17.) "None of those parts of said building which are located upon the respective tracts of ground demised by [these petitioners'] leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially

identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

The position in this case of the Sears-Slater trustees as to their 10 per cent of the fee and the position in this case of these petitioners as to their 80 per cent are identical in all substantial respects. The issue is the same.

Furthermore, an unexpired first mortgage of February 1, 1889, by the tenant conveyed the leasehold as a whole on all tracts. So did an unexpired second mortgage in 1892. (R. 15 and 16.) The mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois.

Should relief complying with the prayer of the bill of complaint ever be granted, such relief must be spread over the whole property as against all fee owners, all bondholders, and all others interested. The question must be decided, if at all, by a construction of the trust deeds and the leases, and the lease of the Sears-Slater trustees is identical with the leases of your petitioners in all relevant provisions. No different question is to be decided as between the tenant and either set of landlords.

While the removing Sears-Slater trustees are not citizens of Illinois, your petitioners are and at all relevant times have been citizens of Illinois, which is the state of citizenship of Chicago Auditorium Association. The mortgage trustee, too, always has been a citizen of Illinois. And the record indicates that the Chapins, own-

ers and landlords of the remaining 10 per cent (called the Studebaker fee), not heretofore specifically mentioned, are citizens of Illinois; their leases are identical in all material respects and are affected.

Hence, the petitioners were wrongfully denied a return to the proper forum and were erroneously compelled to stay in courts where local agencies for administration of applicable state law were unable to protect local property rights.

The petitioners, therefore, submit that by its review of this case the Supreme Court should reverse the judgment of the Circuit Court of Appeals and either affirm the decree of the District Court or else, by appropriate orders, return the case to the Circuit Court of Cook County, State of Illinois.

POINTS AND AUTHORITIES.

A. Equity Jurisdiction.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING "THE INSTANT SUIT IS PROPERLY COGNIZABLE IN A COURT OF EQUITY" AS "ONE TO REMOVE A CLOUD ON TITLE".

The above quoted matter is taken from the lower court's opinion where the court explains why the suit is not an application for a declaratory decree construing the leases and establishing rights thereunder. (R. 608.)

The "cloud", states the lower court after expressing an inclination to follow "liberal holdings" in states other than Illinois (R. 602), consists of the landlords' "position respecting the lease, this written document of record (which position is manifested by oral pronouncement and by their refusal to consent to the rebuilding) *in addition to the* [doubtful] *clauses* [in the leases]" (R. 603; italics by the court). This definition of a "cloud" is to be taken with the earlier statement in the opinion (R. 602) that—

> "* * * though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile [oral] assertion by an adverse claimant, be the basis of a cloud on title."

All of which is to say, this Circuit Court of Appeals lays down the rule that ambiguous provisions in the only instrument by which an owner has his own title, plus a disagreement as to those provisions between said owner

and his grantors manifested merely by oral conversation between themselves, constitute a cloud upon the title which a federal court of equity has traditional power to remove.

The title, thus said to be clouded, is the leasehold of the respondent in realty situated in Illinois, made possible and defined by Illinois law as real estate.

(1909) *People* v. *Shedd*, 241 Ill. 155; 89 N. E. 332.

I.

THE SUBSTANTIVE LAW OF THE STATE OF ILLINOIS, AND NONE OTHER, IS APPLICABLE TO DETERMINE THE RESPONDENT'S TITLE OR WHETHER THE TITLE IS CLOUDED.

(1914) *Guffey* v. *Smith*, 237 U. S. 101.
(1883) *Holland* v. *Challen*, 110 U. S. 15.
(1839) *Clark* v. *Smith*, 38 U. S. 195.

The rule also appears in appropriate phraseology in (1923) *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491 on 499-500, where the court was considering the availability of equitable remedies in federal courts as affected by local law. The court held that state law could not enlarge or diminish the *form* of relief a federal court can give, but that the substantive rights over which such relief may extend can be conclusively determined by the state, saying (Italics ours):

> "For instance, a statute provides that a deed, void on its face, shall be deemed a cloud, whereas theretofore it was not. *It declares 'what shall form a cloud on titles.'* As stated in *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 410, the federal court looks 'to the legislation of the state in which the court sits [and the land is situated] to ascertain what con-

stitutes a cloud upon the title, and *what the state laws declare to be such the courts of the United States, sitting in equity, have jurisdiction to remove*'."

This long-established principle, holding that where state law has created, defined or vested property rights in landowners such law controls federal courts in applying remedies dealing with those rights, was not observed by the Circuit Court of Appeals. For—

II.

DECISIONS OF THE HIGHEST COURT OF THE STATE OF ILLINOIS HOLD THAT DOUBTFUL PROVISIONS IN AN OWNER'S MUNIMENT OF TITLE, COUPLED WITH ORAL HOSTILE ASSERTIONS AS TO SAID PROVISIONS BY AN ADVERSE CLAIMANT, DO NOT CONSTITUTE A CLOUD UPON THAT TITLE.

A leading Illinois decision is (1916) *McCarty* v. *McCarty*, 275 Ill. 573, where the essential facts are nearly similar to those in the instant case. The owner's muniment of title was a will, an instrument of record, and it contained clauses of doubtful meaning which led adverse claimants to dispute orally the owner's title and to claim substantial interests for themselves. In the course of litigation instituted by the owner in possession, the Illinois Supreme Court was asked by him to sustain his bill of complaint as one to remove clouds. The Supreme Court, holding that no cloud upon title existed, said (Italics ours):

> "Considered as a bill to quiet title, or remove a cloud, there was no averment of fact that would give the court jurisdiction. * * * The only averment in the bill respecting any claim contrary to [complainant's] right was that some of the relatives of the testator were [orally] contending that

> the remainders were vested and not contingent and that it was not possible to destroy such remainders; but *courts of equity do not take jurisdiction to remove a mere verbal assertion of ownership in land as a cloud upon title.* * * * A cloud upon a title is a claim apparently valid which may be removed by extrinsic evidence, but if there was any defect in the title of [complainant] it appeared on the face of the will and resort to extrinsic evidence was not necessary. * * * No controversy in any legal form has arisen, and there is no occasion to call upon a court to quiet *a title already quiet and in a state of perfect tranquility.*"

Again, in (1918) *Greenough* v. *Greenough*, 284 Ill. 416, the Illinois court was asked to sustain equity jurisdiction under the cloud-removal theory where the terms of a recorded instrument were doubtful and adverse oral claims, based thereon, were made against the owners thereunder. The Illinois Supreme Court observed that it was met at the threshold of the case with the objection that the court was without jurisdiction because, among other reasons, "a bill will not lie to remove a *supposed* cloud upon a title the basis of which is a verbal claim to an adverse interest" based upon provisions of the plaintiff's own granting instrument. The court sustained the objection, dismissed the bill, and said:

> "Neither can mere verbal claims of parties against an owner in possession be regarded as constituting a cloud on his title and as giving a court of equity jurisdiction to remove the cloud."

These decisions followed unbroken doctrine dating back to (1885) *Parker* v. *Shannon*, 114 Ill. 192, s. c. 121 Ill. 452, where an adverse claimant accompanied his oral assertions of ownership by acts of violence. The owner

sought relief by filing a bill to remove his adversary's oral claims as clouds on title. Relief was denied, the Supreme Court declaring:

> "A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property, as a cloud upon the title. Such clouds upon title, as may be removed by courts of equity, are instruments or other proceedings in writing, which appear upon the records and thereby cast doubt upon the validity of the record title."

Again, in 1889, the Illinois court defined a cloud upon title in *Rigdon* v. *Shirk*, 127 Ill. 411, as follows (Italics ours):

> "A cloud is said to be the semblance of a title, either legal or equitable, or a claim of an interest in lands, *appearing in some legal form*, but which is, in fact, unfounded, or which it would be inequitable to enforce."

There is no break or deviation in application of the rule. The cases also include:

(1922) *Buckner* v. *Carr*, 302 Ill. 378.
(1917) *Warren* v. *Warren*, 279 Ill. 217.
(1913) *First Congregational Church* v. *Page*, 257 Ill. 472.
(1913) *Glos* v. *People*, 259 Ill. 332, 342-4.

Thus, by the property law of the state where the property is situated, a title is not clouded by an adverse claimant's position, orally manifested, as to, or in addition to, doubtful provisions in the owner's muniment of title. Under local law, a cloud must be real, definite, concrete—something capable of removal. It is an instrument or other proceedings in writing appearing of record, though not the same instrument which a plaintiff must produce to show his own title, which asserts

in some legal form an adverse claim that is invalid, but which requires evidence extrinsic to the record title in order to prove the invalidity.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS, HOLDING THAT DOUBTFUL PROVISIONS IN THE RESPONDENT'S MUNIMENT OF TITLE, COUPLED WITH THE POSITION OF THE PETITIONERS BASED THEREON AND MANIFESTED ONLY BY ORAL STATEMENTS, CONSTITUTE A CLOUD UPON TITLE, IS IN CONFLICT WITH THE PROPERTY LAW OF THE STATE OF ILLINOIS.

The "position" of these petitioners, which leads in the Circuit Court of Appeals' definition of the "cloud" in the case here under review, is neither an instrument or other proceedings in writing ever appearing of record; and it was manifested, before suit, in the one talk between President Clinch and our Mr. Willing. The "refusal" of these petitioners to consent to the now proposed rebuilding, secondly entering into the lower court's definition, never came about until after the bill of complaint was filed for the very good reason that the respondent did not lay before these petitioners, or any one else, the proposal as it at the trial was submitted to the District Court. The "clauses" in the leases, mentioned in the excerpt from the trial court's opinion, which, "in addition to" our "position" and our "refusal" combine themselves into a "cloud", as it is said, are portions of the leases between the petitioners as landlords and the respondent as tenant; indeed, the clauses make up by far the greater part of the documents, which are the only possible instruments the respondent has produced to show its own title. No extrinsic evidence to prove the averred invalidity of what the petitioners orally claim as to those clauses is neces-

sary, or, we think, possible. If our position be wrong, it can and must be shown to be wrong by the leases themselves and in no other way.

Hence, the decisions of Illinois are conclusive that if this case were presented to the Supreme Court of Illinois, that court, in line with its established rule, would order dismissal of the bill for the reason no cloud on title exists. The same result should have been obtained in the Circuit Court of Appeals, and that court's disregard for local law is sufficient, we submit, here to lead to a reversal of its judgment.

No useful purpose would be served by a detailed differentiation of the decisions mentioned and relied upon in the opinion of the Circuit Court of Appeals during its delineation of a cloud, because not one is an Illinois decision. The courts of nine states other than Illinois are looked to for support of a "liberal" holding.

The one decision of this Honorable Court found by us and bearing upon the immediate question also is ignored —(1906) *Devine* v. *Los Angeles*, 202 U. S. 313, where the court, disposing of a somewhat similar contention urged by a litigant to sustain equity jurisdiction, said:

> "We do not understand, however, that a bill will lie to dispel mere verbal assertions of ownership as clouds on title * * *."

The only Illinois decision, bearing upon the issue, which seems to have received consideration by the Circuit Court of Appeals was *First Congregational Church* v. *Page*, 257 Ill. 472, also cited above. (p. 23.) There the bill, in so far as it was submitted on the cloud-removal theory (p. 477), was ordered to be dismissed because, the Supreme Court says, it was simply one to construe the plaintiff's own deed of grant. There were doubtful clauses in the deed, and there were adverse claims or po-

sitions orally manifested; but the Illinois court declares (p. 477):

> "It would be a rather anomalous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims title."

In the case at bar, removal of the "cloud" erected by the lower court in its opinion would necessitate literal elimination from the leases of several covenants granting rights to the tenant and reserving rights to the landlords. For instance, the leases provide (R. 42) that the building is security for rent and for the performance of all other covenants imposed upon the tenant; but the tenant desires to destroy that security and to substitute some other security not permitted by the leases. Other covenants, such as covenants requiring the tenant to "keep the building situated upon the demised premises * * * in good repair and in a safe and secure condition * * * and all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease" (R. 42); to rebuild or repair the building, in event of damage or destruction by fire, upon the same plan as was followed in the original structure (R. 43); or the covenant requiring the landlords to pay the tenant the appraised value of the improvements at the end of the term (R. 45),—all are contained in clauses granting or reserving rights, just like the clauses in the above Illinois case of *First Congregational Church* v. *Page*, 257 Ill. 472. The petitioners contend that by these and other clauses in the leases, the tenant may not lawfully tear down the Auditorum. Therefore, if the Circuit Court of Appeals' delineation of a "cloud" be correct, removal thereof would require virtual elimination of all such covenants in the granting provisions of the leases. In fact, a conservative calcu-

lation discloses that removal of the so-called doubtful clauses would strike out one-eighth part of each lease. As the Illinois court observes, that, indeed, would be a rather anomalous situation.

The only method by which any court of equity could conceivably grant the relief prayed by the respondent in this case would be either (1) to strike down as clouds the clauses of the leases which support the landlords' position as invalid provisions, or (2) to adjudicate, by the process of decretal construction of the leases, that the landlords' position is wrong. Of the latter, more presently. The former cannot, as we have demonstrated, be lawfully done. The removal of a cloud demands the existence of that which under applicable law *is* a cloud, and then the nature of practical equitable relief calls for its actual removal: an extraneous instrument is to be canceled or released, etc. An attempt to draft a decree adapted to the prayer of the bill shows the inability of the remedy here. The draftsman finds it necessary to construe and alter the leases—then he is done. And that brings us to our next point:

IV.

THE RELIEF SOUGHT BY THE RESPONDENT, WHICH THE CIRCUIT COURT OF APPEALS ERRONEOUSLY HOLDS IS PROPER, IS AN ADJUDICATION OF ITS OWN TITLE BY THE PROCESS OF CONSTRUING ITS LEASES AND DECLARING THE RIGHTS OF THE PARTIES THEREUNDER.

The contention of the respondent appears in the bill thus (R. 28):

> "Under the proper construction and interpretation of the terms, covenants and conditions of said several leases, your orator is fully empowered and has the right to tear down and remove the present

improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors * * * upon furnishing proper and adequate security during the removal. * * *"

The prayer for relief (R. 31) asks "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises" upon giving security to be fixed by the court until a new building is completed.

The fundamental and controlling question presented, whatever be the head of equity jurisprudence invited, is this: Has the respondent the right, or title, it claims to have under the leases? To answer that question, a court invariably must commence by finding and clarifying the respondent's own title before ever entering upon any inquiry as to the claims of others. Furthermore, and most important to the point now under presentation, it becomes obvious that such finding and clarification of the respondent's own title simultaneously answers the above fundamental and controlling question of the whole case. The reason is that the claims of the respondent and the claims of the petitioners are *conflicting*. And, inasmuch as the conflict of claims grows out of differing views as to the meaning and effect of the leases, it becomes equally obvious that one movement—the construction of the leases—determines every main issue in the case.

But bills to remove clouds from title are not the proper approach in order to receive a judicial decision as to conflicting claims of parties signatory to an instrument conveying land titles. Bills to remove clouds do not lie simply to obtain judicial interpretation of a plaintiff's own granting instrument. Bills to remove clouds presuppose the validity and existence of a plaintiff's own title, and are directed exclusively against the alleged invalid claim of a defendant, to be shown invalid by facts extrinsic to the plaintiff's own recorded evidence of title:

(1894) *Wehrman* v. *Conklin*, 155 U. S. 314 on 322.

(1907) *Lawson* v. *United States Mining Co.* 207 U. S. 1.

(1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375.

To the same effect is (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, with which decision by the Circuit Court of Appeals of the First Circuit the decision of this Circuit Court of Appeals cannot be reconciled.

The respondent, as plaintiff, was and is compelled to admit its own averred title is doubtful. If that were not so, the respondent would have proceeded to tear down the Auditorium Building without awaiting decretal declaration of its rights. To resolve the doubt, the respondent submits the question of *conflicting* claims for an adjudication which, however named, amounts exactly to a decree declaring the rights of the tenant under the leases. The lower court declares the procedure, when released from binding limitations of local property law, a proper function for a federal court of equity. That holding, we submit, is a departure from the rules laid down by this court and in conflict with the weight of authority in other courts.

V.

THE CASE SET UP BY THE RESPONDENT IS NOT EMBRACED WITHIN ANY PRINCIPLE OR HEAD OF EQUITY JURISPRUDENCE, AND IS AN APPLICATION FOR A DECLARATORY DECREE NOT WITHIN THE JUDICIAL FUNCTION.

The essential elements of a justiciable case or controversy, over which the jurisdiction of courts of the United States extends, have been stated with unmistakable certainty in landmark decisions:

(1910) *Muskrat* v. *United States*, 219 U. S. 346.

(1916) *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466.

(1920) *United States* v. *Alaska Steamship Co.*, 253 U. S. 113.

(1926) *New Jersey* v. *Sargent*, 269 U. S. 328.

One such element is that of a wrong done by a defendant to a plaintiff. Such a wrong must be a legal wrong; it must be some unlawful invasion of a plaintiff's rights. In this case, the plaintiff's right is said to be its title to its leasehold. Since, as we have shown, that right or title is permitted and defined exclusively by and under the laws of the State of Illinois where the property lies, it follows that Illinois law must and does determine whether the acts of the petitioners constitute any legal wrong or invasion of that right. We have also shown that under Illinois law the acts charged against the petitioners are not legal wrongs, that the title or right of the respondent is not thereby clouded or assailed in any legal form. Therefore, the essential element of a wrong is wholly lacking, no case is presented, and jurisdiction does not exist. As was said under similar circumstances in (1916) *McCarty* v. *McCarty*, 275 Ill. 573, "No contro-

versy in any legal form has arisen, and there is no occasion to call upon a court to quiet a title already quiet and in a state of perfect tranquility".

Counsel for respondent have complained that this kind of attack by us is an antiquated adherence to forms of procedure. A reflection of the complaint appears in the reference of the Circuit Court of Appeals to "a cabinet of standard labels" to be affixed to bills of complaint and thereby indelibly to classify them. We have not called upon counsel for respondent to classify the bill under any established principle simply in order to affix a label or provide a caption. The challenge was sounded, and is here repeated, that the respondent may point out, if it can, what known principles of equity jurisprudence, if any, are applicable to enable a federal court of chancery to grant relief. In (1926) *New Jersey* v. *Sargent*, 269 U. S. 328, this Honorable Court reviewed the decisions of ninety years and concluded, "It is only where rights of persons or property are involved and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief". Whereupon, this court, furnishing contemporaneous authority for our challenge, proceeds to examine the record in the *Sargent* case to find the familiar essential elements of a judicial action. Not finding any wrong done by the defendant, and, hence, no case or controversy within the judicial function, the court says the bill cannot be entertained.

Here, too, the demonstrated inability of the respondent to point out and prove that any legal wrong has been done to the respondent by the petitioners or others should have resulted below in affirmance of the District Court's decree dismissing the bill.

Much has been said and more doubtless will be said by counsel for respondent about "the broad general jurisdiction of courts of chancery" in modern times. So broad is that field, they say, that equity's power is co-extensive with the needs of persons whenever actions on the law side of the court are inadequate or inappropriate. That is why, they argue, equity should compel the petitioners here to enable the respondent to make profitable use of its property; otherwise, they aver, the leases bargained fairly in 1887 will become oppressive.

But changing circumstances or hardships or lack of commensurate return do not excuse nonperformance of the covenants in the leases, and, since the petitioners are not in the least responsible for creation or development of these conditions, if existent, such conditions are not legal wrongs for which the respondent has any remedy against the petitioners:

(1865) *Ingle* v. *Jones,* 69 U. S. 1.

(1869) *Sheets* v. *Selden,* 7 Wall. 416.

(1896) *Blake* v. *Pine Mt. Iron & Coal Co.,* 76 Fed. 624 on 638.

(1895) *Postal Telegraph Co.* v. *Western Union Tel. Co.,* 155 Ill. 335.

Therefore, under any and all of its theories, the respondent completely fails to show the essential elements of a justiciable case or controversy in that the petitioners have neither clouded the title nor otherwise wronged the respondent, and furthermore, in that the primary right or title of the plaintiff is confessedly doubtful. The direction of the Circuit Court of Appeals to the District Court is a direction to construe the leases in order to guide the parties as to future conduct. That, of course, is a declaratory proceeding not within the jurisdiction of the federal courts.

Illinois has no declaratory judgment or other statute under which jurisdiction can be sustained. This suit, upon the same considerations, would fall in the state courts:

(1900) *Seely* v. *Baldwin*, 185 Ill. 211.
(1911) *Paine* v. *Doughty*, 251 Ill. 396.
(1919) *Prather* v. *Lewis*, 287 Ill. 304.

Even if Illinois had a declaratory judgment statute or any statute of similar nature, the federal courts are forbidden to apply its remedy:

(1927) *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

VI.

AS A BILL TO DECLARE RIGHTS UNDER THE LEASES, THE EXERCISE OF JURISDICTION WOULD BE PARTICULARLY ERRONEOUS BECAUSE A COURT OF EQUITY IS CALLED UPON TO DECLARE AND ADJUDICATE A PLAINTIFF'S TITLE TO REALTY.

The law courts are zealous to retain their jurisdiction over the adjudication of land titles. There can be no commingling of legal and equitable remedies, or the substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is impaired. (1913) *Louisville & Nashville Railroad Co.* v. *Western Union Telegraph Co.*, 234 U. S. 369 on 376.

Where the plaintiff's own title is doubtful, a bill in equity to remove alleged clouds therefrom will not lie:

(1880) *Phelps* v. *Harris*, 101 U. S. 370 on 375.
(1887) *Frost* v. *Spitley*, 121 U. S. 552.
(1894) *Wehrman* v. *Conklin*, 155 U. S. 314.

The rule in Illinois courts is the same:

(1900) *Seely* v. *Baldwin*, 185 Ill. 211.
(1919) *Prather* v. *Lewis*, 287 Ill. 304.

Until universal adoption of the system of recordation of deeds, the courts invariably refused to entertain bills to remove clouds until after a plaintiff had established his own title by at least one successful suit at law. (1894) *Wehrman* v. *Conklin,* 155 U. S. 314. The rule has been modified only to the extent that a favorable judgment at law is not needed where the plaintiff's record title is clear and unassailable. But whenever the plaintiff's own title is not clear, or where there are, as here, *conflicting* claims growing out of the plaintiff's sole muniment of title, a suit to adjudicate the plaintiff's title cannot be sustained as a bill to remove clouds therefrom. That process, however, disguised, would become a declaratory judgment adjudicating title.

If, as the Circuit Court of Appeals holds, doubtful clauses in the leases plus our position orally manifested constitutes a legal wrong, then any tenant becomes able to obtain an adjudication of his title in equity through the fiction of creating a cloud upon his leasehold by talking with his landlord. This strange doctrine opens the doors of chancery to as many bills to remove such clouds as there are or may be differences of opinion between landlords and tenants, and, contrary to the decisions of this Honorable Court, places the declaratory judgment proceeding, so disguised, in operation.

B. Federal Jurisdiction.

THE PETITIONERS WERE WRONGFULLY PREVENTED FROM LITIGATING IN THE COURTS OF THE STATE OF ILLINOIS BY THE ERRONEOUS REFUSALS OF THE FEDERAL COURTS TO REMAND THE CASE TO THE STATE COURT.

The suit was begun in the Circuit Court of Cook County, State of Illinois, by Chicago Auditorium Association, an Illinois corporation and citizen. Its removal to the federal court was procured upon the petition (R. 112) of the defendants known as the Sears-Slater Trustees, not citizens of Illinois, owning one of the five adjacent tracts upon which the building stands and being now lessors under Exhibit 6. (R. 68.) Their petition for removal recites diversity of citizenship between the plaintiff and themselves and avers a separable controversy between that plaintiff and themselves.

We have consistently contended during the progress of the suit that no controversy distinct and separable from the controversy between the plaintiff and these petitioners exists between the plaintiff and the removing parties. Since these petitioners were at all times citizens of Illinois, our contentions took the form of motions to remand to the state court under the Removal Act, set forth above (p. 15, *ante*). Our motions in both District Court (R. 194-5) and Circuit Court of Appeals (R. 635) were denied (R. 196-7; 664), without expression of opinion.

The lease between the Chicago Auditorium Association and the Sears-Slater Trustees and the two leases between said Association and these petitioners are identical in all relevant provisions. The claims of the respondent with respect to all three leases are identical, as is averred in the bill. The position of the Sears-

Slater Trustees and the position of the petitioners with respect to the claims of the respondent in the suit are identical in all respects. The five tracts of land, three of which are owned by the Sears-Slater Trustees and the petitioners, form one contiguous area covered by one entire building. None of those indivisible parts of the building located upon the respective tracts is separable from the entire building as a whole. At the time of execution of the leases it was contemplated and intended by all the parties that a single building, not separable into parts apportionable to the separate leaseholds, should be erected, and the present building was constructed in accordance with such intention. The building cannot well be dismembered, and the respondent's suit is directed toward removal of the entire building to be replaced by another one covering the entire area. (R. 17, 29.) The unexpired mortgages convey the leasehold as a whole on all the tracts.

Any relief ever granted under the prayer of the bill must be spread over the whole of the property as against all the fee owners, all the bondholders, the mortgage trustee and all others interested. The issues upon the merits must be decided, if at all, by the construction of the leases and the trust deeds. So far as the issue involving the leases would be concerned, no question is to be decided between the Illinois tenant and the foreign Sears-Slater Trustees differing in any way from the question to be decided between the Illinois tenant and these petitioners who are citizens of Illinois.

It is obvious there is no separable controversy. There was only one controversy which affected alike all the defendants, and in any alignment of parties on either side of this controversy the Sears-Slater Trustees must be aligned with these petitioners (and other defendants) who are citizens of Illinois.

I.

THERE IS NO SEPARABLE, REMOVABLE CONTROVERSY UNLESS THERE IS A SEPARATE AND DISTINCT CAUSE OF ACTION AS TO THE DEFENDANTS SEEKING REMOVAL, WHICH CAN BE DECIDED AS BETWEEN SAID DEFENDANTS AND THE PLAINTIFF IN THE ABSENCE OF ALL OTHER DEFENDANTS:

(1892) *Torrence* v. *Shedd*, 144 U. S. 527.
(1882) *Fraser* v. *Jennison*, 106 U. S. 191.
(1884) *Ayres* v. *Wiswall*, 112 U. S. 187.
(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56.

If for no other reason, the presence of all the fee-owners would be indispensable in order for a court to adjudicate their inter-related rights. For instance, the nature of the property has brought into being cross-easements of support amongst the fee owners. The land of the petitioners touches the land of the Sears-Slater Trustees on two sides totalling 250.5 lineal feet. Crossing these boundaries the building rises at least ten stories, whereby easements have become appurtenant to each fee. (*Springer* v. *Darlington*, 207 Ill. 238; *Gibson v. Holden*, 115 Ill. 199; *Ingals* v. *Plamondon*, 75 Ill. 118; *Foote* v. *Yarlott*, 238 Ill. 54.) These easements are matters of concern to the reversioners, but the respondent's proposals for any new building would forever alter totally the existing arrangement. (R. 374-5.) Suppose, under these conditions, the bill had been filed against the Sears-Slater Trustees only: could any court grant to the plaintiff in such a suit the relief prayed in the present bill as to the Sears-Slater tract only? Surely not, because any decree against the Sears-Slater Trustees must of necessity include provisions bearing upon the easements and other rights of adjacent property-owners, these petitioners. This example also negatives the

suggestion, which has been made, that the instant case is a convenient bundle of separate causes of action (R. 660), and it demonstrates that all the fee owners are indispensable parties to the bill of complaint.

In all its aspects, there is only one controversy on one side of which stands the Illinois respondent and on the other side of which stands the Illinois petitioners and the Sears-Slater Trustees of Massachusetts and New York. The refusal of the two lower courts to remand the case seems palpable error. Surely the least that can be said is that the right to remove was doubtful, in which event the federal courts uniformly remand. (1918) *Thomas* v. *Delta Land & Water Co.*, 258 Fed. 758; (1919) *Boykin* v. *Morris Fertilizer Co.*, 257 Fed. 827; (1917) *Hansen* v. *Pacific Coast Asphalt Cement Co.*, 243 Fed. 283.

II.

IT BECOMES THE DUTY OF A FEDERAL COURT, AT WHATEVER STAGE OF LITIGATION IT DISCERNS THAT FEDERAL JURISDICTION IS LACKING IN A REMOVED CASE, TO REMAND IT TO A STATE COURT:

(1904) *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48.

(1890) *Graves* v. *Corbin*, 132 U. S. 571.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527.

Our principal concern is that the Circuit Court of Appeals decided the question of equity jurisdiction contrary to the land laws of Illinois. We think an Illinois court would not have countenanced the cloud upon title which the Circuit Court of Appeals erected. A return to the state forum would have enabled the petitioners to avail themselves of decision and of review of decision by those courts administering that law which the Circuit Court of Appeals ignores and, in effect, overrules.

CONCLUSION.

The result of the decision of the lower court, here under review, is the establishment of the following rule relating to equity jurisdiction:

> A federal court of chancery has original jurisdiction to construe and to alter written leases of realty whenever the landlord and tenant are unable to agree upon the meaning and effect of provisions in said leases to the future detriment of the tenant, because such provisions, if susceptible of doubtful construction even though the doubt be a forced one, when accompanied by an orally manifested position taken by the landlord contrary to an orally manifested claim made by the tenant, constitute a cloud upon the title of the tenant which a federal court, regardless of local law saying these facts do not constitute a cloud upon title, is empowered to remove either by construing the doubtful provisions or by striking said provisions from the leases.

The procedure, so established here, is without precedent and without authority. It is against precedent and is against authority of federal decision, and it violates the rule that local law controls federal judicial dealing with local land titles. By this procedure, parties to contracts involving rights to real property can usually devise such fictitious clouds and thereby manage to obtain judicial construction or alteration of the terms thereof, without the existence of any legal wrong done or threatened by one to the other. Thus is the forbidden declaratory judgment and decree made possible in federal courts. The result seems explainable under no hypothesis other than an adherence by the Circuit Court of Appeals to respondent's baldly as-

serted heresy that "in any extraordinary or unusual cases the extent of the need is the measure of jurisdiction". The answer is that when any federal court begins to measure its ability to apply judicial force solely by the alleged extent of the alleged need of one litigant, then does such federal court transgress the constitutional limitations placed upon the judiciary. If the present decision in this case be permitted to stand as a precedent, the courts of the United States are opened to the settlement of mere arguments.

Wherefore, the petitioners pray for the entry of judgment in the Supreme Court of the United States, reversing the judgment and orders of the Circuit Court of Appeals for the Seventh Circuit, because:

1. The Circuit Court of Appeals, by its decision, has erroneously decided an important question of local law in a way in conflict with applicable local decisions, in that said lower court has decided certain facts do constitute a cloud upon title to Illinois realty, whereas controlling Illinois law declares said facts do not constitute any cloud upon title.

2. The Circuit Court of Appeals has sustained equity jurisdiction only by its erroneous erection of such cloud on title. Without that cloud, no wrong exists and no justiciable case or controversy is presented. Hence, the Circuit Court of Appeals should have affirmed the decree of the District Court dismissing the bill of complaint as a mere application for a declaratory decree.

3. The Circuit Court of Appeals has decided an important question of general law in a way conflicting with decisions of the Supreme Court of the United States and conflicting with decisions of other Circuit Courts

of Appeals, in that said court has held that a plaintiff's own doubtful title can be adjudicated by a court of chancery in his so-called suit to remove alleged clouds therefrom.

4. The Circuit Court of Appeals in remanding the case to the District Court has erroneously directed the District Court to consider the alteration of the terms of the leases, which result, if decreed, would be the unlawful making of new contracts between the landlords and tenant.

5. The Circuit Court of Appeals, by its refusal to remand the case to the state courts, has not complied with the requirements of the Removal Act, thereby further precluding the petitioners from the protection of that local property law which defeats equity jurisdiction by destroying the alleged cloud upon title constructed in the Circuit Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND MARK S. WILLING,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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INDEX.

		PAGE
A.	Equity jurisdiction	1
	Obstacles are not wrongs	3
	Respondent's Illinois cases distinguished	6
	Irrelevant contentions and cases	8
B.	Federal jurisdiction	11
	Petitioners as indispensable parties to the removed case	11
	The mortgagee trustee as an indispensable party	13
C.	"The plaintiff's right to rebuild"	15
	Consideration thereof not before the court	15
	Outline of petitioners' position upon the merits	17
D.	The equities of the case	30

Table of Cases.

Abel v. Wuesten, 143 Ky. 513; 136 S. W. 867.....22, 28
Agate v. Lowenbein, 57 N. Y. 604..... 17
Alabama, etc. Co. v. Thompson, 200 U. S. 206..... 12
Alice State Bank v. Houston Pasture Co. 247 U. S. 240..... 16

Bass v. Metropolitan W. S. E. Co. 82 Fed. 857..17, 21, 28
Blake v. Pine Mt. I. & C. Co. 76 Fed. 624..... 26
Bushwick Realty Co. v. Sanitary Co. 114 N. Y. Supp. 13..... 25

Calthorpe v. McOscar, 1 K. B. 716; 93 L. J. K. B. 273..... 26
Cawker v. Trimmel, 155 Wis. 108; 143 N. W. 1046.17, 29
Chicago Telephone Co. v. N. W. Tel. Co. 199 Ill. 324 6
Columbus Ry. Co. v. Columbus, 249 U. S. 399..... 26

Davenport v. Magoon, 13 Ore. 3.....17, 22, 28
Doherty v. Allman, L. R. 3 App. Cas. 709..... 24
Dooly v. Stringham, 4 Utah, 107; 7 Pac. 405.....22, 29

Ely v. Ely, 80 Ill. 532..... 25

Federal Life Ins. Co. v. Rascoe, 12 Fed. (2nd) 693.. 16
Fulwiler v. McClun, 285 Ill. 174.....6, 7, 8

Gavin v. Curtin, 171 Ill. 640..... 8
Graves v. Corbin, 132 U. S. 571..... 12

Hamburger v. Settegast, 62 Tex. Civ. App. 446; 131 S. W. 639..... 28
Holt v. Fleischman, 74 N. Y. Supp. 894..... 19
Hubbard v. Tod, 171 U. S. 474..... 16

Ingle v. Jones, 69 U. S. 1..... 25

Jacobs v. McGuire, 136 N. Y. Supp. 64..... 25

Keough v. Peck, 316 Ill. 318..... 26
Kutter v. Smith, 2 Wall. 491..... 21

Louisville, etc. Co. v. Ide, 114 U. S. 52..... 12
Louisville & Nashville R. Co. v. Western Union Tel. Co. 234 U. S. 369..... 7
Lovell v. Marshall, 162 Minn. 18..... 9

McArthur v. Hood Rubber Co. 221 Mass. 372..... 26
McCarty v. McCarty, 275 Ill. 573..... 6, 7
McDonald v. O'Hara, 117 Misc. Rep. 517; 192 N. Y. Supp. 545 28
McKinley v. Jutte & Co. 230 Pa. St. 122; 79 Atl. 244 25
Melms v. Pabst Brewing Co. 104 Wis. 7..... 29
Mumford v. Rock Springs Assn. 261 Fed. 842..... 6
National F. I. Co. v. Elliott, 7 Fed. (2nd) 522..... 13
Parkman's Admr. v. Aicardi, 34 Ala. 393..... 29
Pike v. Cincinnati Realty Co. 179 Fed. 97..... 24
Postal Telegraph Co. v. Western Union Telegraph Co. 155 Ill. 335..... 26
Purvis v. Shuman, 273 Ill. 286..... 18
Rector v. Rector, 201 N. Y. 1.....9, 26
Riverbank Improvement Co. v. Chadwick, 228 Mass. 242..... 26
Sharon v. Tucker, 144 U. S. 533..... 16
Sheets v. Selden, 7 Wall. 416..... 25
Slegel v. Herbine, 148 Pa. St. 236..... 9
Smyth v. Carter, 52 Eng. Rep. 31, 18 Beav. 78..... 17
Steele v. Drummond, ... U. S. .....; 48 S. C. Rep. 53 15
Sullivan v. Monahan, 123 Ill. App. 467..... 18
Venner v. Chicago City Ry. Co. 258 Ill. 523..... 6
Webster Electric Co. v. Splitdorf Electrical Co. 264 U. S. 463 16
Williams v. Chicago Exhibition Co. 188 Ill. 19..... 28
Wilson v. Oswego Township, 151 U. S. 56..... 12
Winship v. Pitts, 3 Paige Ch. 259..... 28
Woolworth Co. v. Nelson, 204 Ala. 172; 85 So. 449..17, 28

TEXTBOOKS.

Jones, Landlord & Tenant, Sec. 632..... 29
McAdam, Landlord & Tenant (4th Ed.) 1284..... 29
1 Tiffany, Landlord & Tenant, pp. 716-7..... 29

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Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION, A CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A. EQUITY JURISDICTION.

In submitting this case to the Supreme Court for review, the petitioners stated specific reasons for reversal of the judgment of the Circuit Court of Appeals. Among those reasons was:

1. That the Circuit Court of Appeals, by its decision, has erred in deciding an important question of local law

in a way in conflict with applicable local decisions in that said lower court has definitely decided certain facts or circumstances do constitute a cloud upon the title to Illinois realty, whereas controlling Illinois law declares such facts or circumstances do not constitute any cloud on title. (Petition for Writ of Certiorari, 2, 12, 28; Brief for Petitioners, pp. 3, 40.)

Equity jurisdiction was sustained in the Circuit Court of Appeals solely and exclusively upon the theory that the petitioners had clouded the title of the respondent, thereby committing a legal wrong which a court of equity has power to redress. Our attack upon the decision of the Circuit Court of Appeals was directed very largely against that premise thus made essential to support its conclusion; for, minus that cloud upon title, as the opinion of the lower court concedes, no wrong exists and no justiciable case is presented.

Instead of meeting that issue, respondent's brief omits any particular defense for the process by which the Circuit Court of Appeals reached its conclusion. Instead of attempting to justify the lower court's holding that the petitioners have clouded the respondent's Illinois title, the respondent's brief travels the interesting but unhelpful steps in the development of equity jurisprudence to restate principles with which we never have quarreled because they are irrelevant. The genesis, growth, nature and extent of the jurisdiction of a chancellor to grant relief in a *proper* case are not here involved. Our contention is that no proper case or controversy exists for the reason that the essential element of a legal wrong done by any defendant to the plaintiff does not appear.

In our principal brief, we have pointed out wherein the Circuit Court of Appeals erred by its holding that

there is a justiciable case for that, as its opinion expressly declares, the petitioners have wronged the respondent by clouding its title to real estate. We have demonstrated by decisions of this Honorable Court that the property law of Illinois, and none other, is applicable and controlling to determine whether the respondent's Illinois title ever has been clouded; and we have further demonstrated that decisions of the Supreme Court of Illinois hold repeatedly and consistently that doubtful provisions in an owner's sole instrument of title, coupled with oral hostile assertions as to the interpretation of said provisions by other parties signatory to said instrument, do not constitute in Illinois a cloud upon that title or a legal wrong against the owner of that title.

OBSTACLES ARE NOT WRONGS.

Respondent's avoidance, not answer, of our presentation is its contention (Respondent's Brief, p. 15) that "when there is a legal right to the beneficial use of property" and "when *obstacles* prevent the present enjoyment of that right," a court of chancery may "remove those obstacles" unless relief at law exists.

What obstacles prevent present enjoyment of the tenant's alleged rights? Respondent's whole reply is, doubtful clauses in the leases and the petitioners' orally manifested disagreement as to the meaning of those clauses. Let us consider those "obstacles" separately, then together.

The leases were bargained fairly forty years ago; no charge is made that anyone was overreached or that the instruments fail to state the intentions of the parties. The evidence shows that Walker, our predecessor in

title, was one of the organizers of the Chicago Auditorium Association; that so friendly and co-operative were the first landlords and tenant that the building actually was under construction several months before the leases were made and executed. The leases, as then made, are the only contracts by which the fee-owners ever granted to the tenant any and all its rights for beneficial use of the property. If, then, the terms and provisions of those leases now present an obstacle to some new or different use of the property, that obstacle, lying in and sanctioned by the matured, valid contracts, must stand unless courts have the power to remake the contracts or the parties themselves remake them. No question of public policy is involved; the question is whether private contracts do or do not grant to the tenant the rights it claims. That question, however approached, is a problem of construction, and we think we need not repeat our points and authorities holding that courts of equity of the United States lack original jurisdiction over suits simply to construe instruments *inter vivos* in order to declare land titles. (See our principal brief, pp. 28-29.)

Again, if the clauses in the leases do actually present obstacles to use of the property, the petitioners committed no wrong by putting them there; the language selected was the language of both parties, and for nearly four decades no complaint ever arose. Now that performance of its agreements by the tenant may deprive it of a changed, unauthorized beneficial use of the property, the tenant seeks to have the courts make possible such unwarrantable advantage by a decree removing, as some sort of obstacle, the objectionable covenants from its granting instruments. Courts have no such power.

Respondent's other "obstacle" is said to be the peti-

tioners' orally manifested refusal to coincide with respondent's views as to the interpretation and force of various covenants in the leases which respondent in its bill of complaint and elsewhere concedes are very doubtful.

In his one conversation with the president of the respondent company, our Mr. Willing was in no sense an aggressor. President Clinch sought Mr. Willing, opened the discussion, broached the proposal. Mr. Willing simply said he did not believe, after consultation with his lawyers, the tenant had a right to tear down the Auditorium, which may be construed to mean that the Willing interests, as landlords, did not consent to the only proposal President Clinch then made. The court will observe that Mr. Willing's attitude was otherwise wholly passive; that he made no threat of forfeiture or of any legal proceedings. The threat of litigation came from President Clinch, and not until after that threat was fulfilled by the institution of this lawsuit did any landlord ever make his position known upon the records or elsewhere. Mr. Willing had a right to disagree with President Clinch in that conversation, even if Mr. Willing were ill-advised. By so doing, he did no legal wrong to the respondent for purported relief against which the respondent may call upon the courts. Elsewhere we have presented abundant, compelling authority that by Illinois law Mr. Willing's words, spoken within the confines of his office and heard by none save the parties themselves, constitute no cloud upon the respondent's title, and create no improper obstacle to whatever beneficial use of the property the tenant may possess. There was no unlawful act; there was no promise or threat of any unlawful act; there was no legal wrong committed by anyone.

Persons who, like Mr. Willing, conceive that their rights are involved or may be involved in controversies are entitled to think, to discuss, to take the advice of counsel.

(1913) *Venner* v. *Chicago City Ry. Co.* 258 Ill. 523 on 550.

(1902) *Chicago Telephone Co.* v. *N. W. Tel. Co.* 199 Ill. 324 on 365-6.

(1919) *Mumford* v. *Rock Springs Ass'n.* 261 Fed. 842 on 849.

Thus it appears that neither of the alleged "obstacles" mentioned by respondent as preventing its desired beneficial use of the property is a wrong done by the petitioners for which respondent is entitled to invoke the jurisdiction of a court of equity. Adding one to the other avails nothing. As was said in (1916) *McCarty* v. *McCarty*, 275 Ill. 573 (our brief, pp. 21-2), where there were both doubtful clauses in a plaintiff's own grant and orally manifested counterclaims, "no controversy in any legal form has arisen and there is no occasion to call upon a court to quiet a title already quiet and in a state of perfect tranquility."

Just here it seems proper to refute respondent's belief that the force of *McCarty* v. *McCarty*, 275 Ill. 573, is lessened by the later decision in *Fulwiler* v. *McClun*, 285 Ill. 174. (Respondent's Brief, pp. 47-9.) The latter in nowise detracts from the former as an authoritative holding of the Illinois Supreme Court for the purpose we first cited it.

The *McCarty* case started as a bill to construe a will under Section 50 of Chapter 22, Illinois Revised Stat-

utes, which is set forth in the footnote.* The Illinois court first held that there was no ambiguity in the will requiring construction and that no provision of the statute was applicable to sanction jurisdiction thereunder. Thereupon, the litigant, so rebuffed, asked the court to decide the parties' oral dispute by considering the bill as one to quiet title or remove a cloud; and, as we have shown, the court said there was no cloud and dismissed the bill.

But the *Fulwiler* case started and finished as a bill to construe a will under the Illinois statute. The opinion indicates that counsel for the defendants in the case believed the will so unambiguous as not to need construction, and that under so much of the *McCarty* case rule *as bore upon cases under the statute* the bill should have been dismissed. In eight lines of the opinion, the Supreme Court says the *Fulwiler* case is different on the facts to the extent that the statutory provisions covering "the conservation, preservation, protection or betterment of said estate during a period of contingency pending a contingent remainder or executory devise or other-

* "The Court may hear and determine bills to construe wills, notwithstanding no trust or questions of trust or other questions are involved therein; and hear and determine bills to appoint trustees, and authorize trustees to lease, mortgage and sell, improve, exchange and invest any portion or all of any trust estate, or to do any other act or thing, or exercise any power and discretion which is necessary for the conservation, preservation, protection or betterment of said estate during any period of contingency pending a contingent remainder or executory devise or otherwise; and may also hear and determine bills to quiet title, and to remove clouds from the title to real estate and bills to establish and confirm titles to real estate or incumbrance thereon whether the lands in controversy are improved or occupied, or unimproved or unoccupied; and the taking possession of such lands, after the commencement of suit by the party claiming the title or the adverse title, or any one under or through such person or persons shall not in anywise affect the complainant's right to a final decree upon his bill."

There is no contention or thought that this Auditorium bill of complaint is sustainable under above statute. Cases such as (1913) *Louisville & Nashville R. Co.* v. *Western Union Tel. Co.* 234 U. S. 369, 376, illustrate the reasons respondent heretofore has conceded render this Illinois remedial statute without force in federal courts.

wise" are applicable. Wherefore, the bill in *Fulwiler* v. *McClun* was sustained solely as a bill under the statute. Likewise, *Gavin* v. *Curtin*, 171 Ill. 640, from which respondent's brief quotes (p. 19), exemplifies the principle that, apart from statute, chancellors have long exercised jurisdiction in testamentary matters to preserve inheritances. In this Auditorium case now at bar, there is no will, no devise, no inheritance to protect—nothing whatsoever to invoke the Illinois statute, and certainly nothing to prompt opposing counsel into the astonishing statement that the *Fulwiler* case would settle the jurisdictional question in an Illinois court.

IRRELEVANT CONTENTIONS AND CASES.

Unable to support by Illinois decision that its title has been clouded or that any petitioner ever has committed any wrong against the respondent, counsel are driven to reiterated invocation of "broad principles" of equity jurisdiction. So broad is that power, they say, that whenever one has a legal right to use property, and cannot find some adequate writ in the law courts to help him use it, equity must step in to make the use available. This, they say, must result especially where subject matter of considerable value is involved, and regardless of the fact that no legal assault upon the averred legal right has been made by anyone. In this connection, counsel have observed that "a justiciable right does not require a wrong to bring it into being." We never, at any stage of this litigation, have said the contrary. Our point has been, and is, that suits or controversies to which the federal judicial function extends must contain more than the existence and assertion of a primary right possessed by a plaintiff; that, to quote

Pomeroy, there must also be presented "a delict or wrong done by the defendant which consisted in a breach of said primary right" and of a breach of duty devolving upon the defendant toward the plaintiff. (See our principal brief, pp. 30-31.) And in this behalf, we have, by the aid of controlling Illinois law and under long-established rules in the decisions of this Honorable Court, clearly shown that, assuming the respondent's primary right, there has been no delict or wrong done by any petitioner to that right. Hence, there is no case or controversy; there is nothing more than an application for a declaratory decree construing the leases and trust deeds to establish the averred primary right. The courts have no jurisdiction because there is no case or controversy.

The anomalous holdings in cases like *Rector* v. *Rector*, 201 N. Y. 1 (Respondent's Brief, p. 64); *Slegel* v. *Herbine*, 148 Pa. St. 236 (Respondent's Brief, p. 53); *Lovell* v. *Marshall*, 162 Minn. 18 (Respondent's Brief, p. 53) wherein opposing counsel perceive inclinations toward definitions of clouds upon title different from the Illinois definition, are not in point because Illinois real estate is here involved and Illinois substantive law controls.

In conclusion of our reply to respondent's presentation of its argument for the exercise of equity jurisdiction, we repeat that counsel have failed to justify the holding of the Circuit Court of Appeals that the present bill is maintainable as a bill to remove clouds from title. The conclusion of the lower court rested upon its erroneous determination that the petitioners had clouded the respondent's title. To reach that conclusion, the lower court disregarded and, in effect, overruled nu-

merous decisions of the Supreme Court of Illinois as to what is a cloud on title. Since no cloud on title exists and since no legal wrong of any kind ever was done by any petitioner to the respondent, the suit becomes an application for a declaratory decree construing the leases and adjudicating a plaintiff's own doubtful title. The federal courts have no declaratory judgment jurisdiction and the bill should be dismissed as such.

B. FEDERAL JURISDICTION.

The noteworthy concession in respondent's discussion of federal jurisdiction is that if the Willing defendants were indispensable parties to so much of the action as is directed against the Sears-Slater defendants, then there may not have been any separable controversy between the foreign removing Sears-Slater defendants and the local Illinois plaintiff. That is to say, respondent admits that if any Illinois citizen is an indispensable party defendant to the suit which it brought against the foreign Sears-Slater defendants, federal jurisdiction has been wrongfully retained over our motions to remand. Respondent's position is that no such Illinois defendant is or need be in the Sears-Slater controversy. With that position, we cannot agree.

It would be physically impossible to tear down so much of the Auditorium Building as rests upon the Sears-Slater fee without simultaneously wrecking a very considerable portion of the building resting on the Willing fee. As the bill avers, the tracts form one contiguous area covered by "one entire building," no part of which is "separable from the entire building taken as a whole." (R. 17.) The bill further avers that the five leases covering the entire area were substantially identical in terms and contemporaneous in execution, and that it was contemplated and intended by all of the parties to all five leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on the entire area, and that the present building was constructed in accordance with such intention and cannot be dismembered without heavy expense and loss.

The allegations of the bill, plus the law of Illinois by which each fee-owner obtained during construction an easement of support in the land and building on each adjacent tract, should, of themselves, be adequate to show that the bill would have been dismissable for want of indispensable parties if it, so drawn, had named as defendants thereto only the Sears-Slater trustees. Conceivably counsel for the respondent might have drawn a bill of complaint which on its face would not have shown lack of indispensable parties; but that is beside our question. The situation is, that in the pleading filed by the plaintiff to state its case the plaintiff in fact has set forth all five leases, the unseverable building, the facts showing inter-related easements, the identity of subject matter, the identity of issues—and the absolute need for the court to have jurisdiction over *all* the landlords.

The case made by the plaintiff's own pleading determines whether the case is removable.

(1890) *Graves* v. *Corbin*, 132 U. S. 571.

(1885) *Louisville, etc. Co.* v. *Ide*, 114 U. S. 52.

(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56.

(1906) *Alabama, etc. Co.* v. *Thompson*, 200 U. S. 206.

Counsel's discussion about the value of our easement of support is wholly immaterial. Likewise, respondent's mention that at one stage of the proceedings the Willing defendants urged multifariousness in the amended bill of complaint has no bearing upon the question of whether the case made by the plaintiff in the state court was removable to the federal court. And so also as to respondent's unhelpful comment that these petitioners raised the question of federal jurisdiction only when it

seemed the battle was going against them. Notwithstanding a favorable decree in the District Court, these petitioners, in their brief as appellees in the Circuit Court of Appeals mentioned and preserved the point as best they then could. (See also R. 638.) Cross errors cannot be assigned by a successful litigant on appeal in federal equity courts. (1925) *National F. I. Co.* v. *Elliott*, 7 Fed. (2nd) 522, 527. The question was thoroughly debated in the District Court and was considered at the first available opportunity in the Circuit Court of Appeals.

IN RE THE MORTGAGE TRUSTEE.

Respondent's counsel, having made the concession as to indispensable parties first above noted, approach differentiation as to the mortgage trustee with admitted reluctance, and for good cause. Just why or how counsel can say the trustee is not an indispensable party in its suit against the Sears-Slater trustees is beyond our understanding.

Again returning to the case made by the plaintiff in its bill filed in the state court—for that must be our point of beginning—we find the plaintiff relating that the mortgage trustee by conveyances from the plaintiff has right, title and interest in and to so much of the building and leasehold as rests upon the Sears-Slater fee; that, indeed, the two mortgages are spread over the building and leasehold on all the fees; and that the plaintiff wishes to destroy a very substantial portion of the property so conveyed to the trustee and to substitute other security. How can it be said that to a bill containing such averments the trustee was not an indispensable party defendant?

Later, the bondholders were added to the roster of defendants. Service by warning was obtained. Some appeared, denying the rights of the plaintiff. And, statements of respondent's counsel notwithstanding, the trustee has in fact been an active resistant. Counsel for the trustee co-operated with the active defendants throughout the case; argued the motion to dismiss the bill; answered (R. 104, 143) denying plaintiff's cause of action; participated in the taking of evidence; wrote a portion of our briefs in the Circuit Court of Appeals; argued orally in the Circuit Court of Appeals, and has otherwise evidenced opposition to the relief sought by plaintiff against the trustee. It makes no difference that counsel for the respondent do not think the trustee ought to be resisting, or why the trustee does resist; the point is that by its bill of complaint the respondent set forth facts indicating the imperativeness of the trustee as a party, has not dismissed the trustee out of the case—and that the trustee is a citizen of Illinois.

Thus, there were when the suit was removed and there are now citizens of Illinois aligned in law and in fact as defendants with the foreign Sears-Slater defendants, all enmeshed in one controversy, unseparable from the Illinois plaintiff and the foreign removing defendants.

C. "PLAINTIFF'S RIGHT TO REBUILD."

With the assertion that there are no controverted issues of fact the determination of which can affect disposition upon the merits, counsel for respondent devote a substantial portion of their brief to an appeal for the Supreme Court, if jurisdiction be sustained, to direct the entry of a decree establishing the substantive rights of the parties. (Respondent's Brief, 3; also 102 to 143.)

Whatever may be the holding of this court upon the jurisdictional questions, we submit it is improper to determine now the so-called merits of the case.

The petition for a writ of certiorari was prayed for and the writ was allowed because of averred errors committed by the Circuit Court of Appeals as to jurisdiction, and naught else. Neither the District Court nor the Appellate Court touched upon the merits. In its opinion, the Circuit Court of Appeals says:

> "In this opinion we have refrained from stating appellees' fact position regarding this clause in the lease. We have done so for the reason that we are not concerned with the *controverted facts* bearing on this issue. We want the district court to know that we have not in any way intimated our views respecting these facts, or the persuasiveness of the facts on either side. Our sole question is to determine whether a court of equity should take jurisdiction of the suit. The trial court must determine whether the facts justify the relief sought. And its approach to this question should be uninfluenced by anything we may have said on the legal question here under consideration."

The following decisions of the Supreme Court hold that any effort by us to bring up for consideration matters undecided below and not relied upon in seeking this review would be improper:

(1927) *Steele* v. *Drummond*, ... U. S. .....;
48 S. C. Rep. 53.

(1924) *Webster Electric Co.* v. *Splitdorf Electrical Co.* 264 U. S. 463 on 464.
(1918) *Alice State Bank* v. *Houston Pasture Co.* 247 U. S. 240 on 242.
(1898) *Hubbard* v. *Tod,* 171 U. S. 474 on 494.

Again, the instant case, unlike respondent's citation of *Sharon* v. *Tucker,* 144 U. S. 533, does present controverted issues of facts. In our last above quotation, we have italicized words which show that the Circuit Court of Appeals thinks there is such a controversy. The contents of Judge Wilkerson's opinion, in so far as evidence is recited, are not judicial findings. (*Federal Life Insurance Co.* v. *Rascoe,* 12 Fed. (2nd) 693 on 695.) There is no lower court adjudication or consideration of the issues of fact, and no error is or can be assigned by any party against any decision upon the merits.

The relief sought by the respondent as plaintiff, if jurisdiction exist, demands a painstaking examination of hundreds of pages of testimony and many exhibits. Any decree that might be entered must construe in detail the covenants of leases and trust deeds, must define the nature, cost and specifications of the projected new building, must specify the securities to be deposited during reconstruction, must indicate what portions of the leases are to be stricken out as to purchase of the building at the end of the term and so on. None of these questions has been considered in the lower courts. That the petitioners would have much to say about them may best be shown by the following summary of points and authorities which, at a proper time and under proper circumstances, we shall be prepared to submit.

I.

IT IS CONCEDED NO PROVISION OF ANY LEASE OR OTHER INSTRUMENT EXPRESSLY GRANTS TO THE TENANT A RIGHT TO TEAR DOWN THE EXISTING BUILDING, OR TO REBUILD EXCEPT IN CASE OF FIRE.

II.

IN THE ABSENCE OF ANY SUCH EXPLICIT AUTHORIZATION, THE INQUIRY IS: DO THE LEASES CARRY, BY NECESSARY IMPLICATION, THE PARTICULAR RIGHTS CLAIMED BY THE TENANT?

In any hearing upon the merits, we should contend the answer is negative. Among the reasons are:

(a) THE LANDLORDS, AS FEE OWNERS, RETAIN ALL DOMINION NOT EXPRESSLY GRANTED OR NECESSARILY TO BE IMPLIED AS GRANTED FROM THE TERMS OF THE LEASES.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

(1874) *Agate* v. *Lowenbein,* 57 N. Y. 604.

(1853) *Smyth* v. *Carter,* 52 Eng. Rep. 31, 18 Beav. 78.

(1920) *Woolworth Co.* v. *Nelson,* 204 Ala. 172; 85 So. 449.

(1913) *Cawker* v. *Trimmel,* 155 Wis. 108, 143 N. W. 1046.

(1884) *Davenport* v. *Magoon,* 13 Ore. 3.

Unless the landlords have granted to the tenant the particular rights claimed—rights which would enable the tenant to virtually unrestricted use of the land, including complete alteration of the reversion—the tenant has no such rights. All cases on waste, cited hereafter, support the principle. Hence, it is the rule that

a plaintiff lessee has the burden of proving any grant by implication, and that any doubt must be resolved in favor of the owners. And the principle is all the more apparent where, as here, the tenant has no freehold, but only contractual rights during a term of years. We should contend this respondent cannot carry this burden of proof.

(b) All the Express Covenants Indicating What Shall Be Done Carry Implied Covenants as to What Shall Not Be Done. This Is the Illinois Law.

(1916) *Purvis* v. *Shuman*, 273 Ill. 286.
(1905) *Sullivan* v. *Monahan*, 123 Ill. App. 467.

Among such covenants are affirmative covenants, performable by the tenant, to erect a certain building; to keep that building in good repair and in a safe and secure condition and all rooms therein in a good, safe, clean and tenantable condition during the entire term; to rebuild or repair that building upon the same plan if damaged by fire; to let that building stand as security for rent and for performance of all covenants, and to yield possession of that building at the end of the term upon payment for that building by the reversioners.

The evidence shows that the original building plans were drafted early in 1886. (R. 223.) Construction was commenced in 1886. (Def's. Ex. 1.) But the leases were executed on January 17, 1887, effective as of August 1, 1886. Obviously, the parties contracted on the basis of the precise building then fully planned and under construction. No other building was mentioned or contemplated, except in case of destruction or damage by fire, in which event the tenant "shall rebuild or repair *the same* upon the same plan as before the said fire hap-

pened, or such other plans as by the [landlords] shall be approved in writing, and have the same rebuilt and ready for occupancy within two (2) years." If the parties intended to grant to the tenant, as respondent now claims, the right to tear down and rebuild at its caprice, the above covenant might as well have been omitted. Could it have been that the landlords were concerned about control of restoration after a fire, but were unconcerned about that control if destruction transpired otherwise?

The effect of the supplemental leases of July 9, 1891, is important. By this supplement, the parties eliminate the original provisions for fixing rent and extend the term 100 years. Then they say:

> "* * * all the covenants, agreements, conditions and provisions of said original lease except as hereby modified, shall be and continue in full force and effect until the final expiration of the term demised by said lease as modified and extended by this agreement."

It was equivalent to a re-execution of the leases in 1891. Whatever options the tenant originally had as to the nature of the building have now been exercised and the entire tract has been filled by a structure thus found in 1891 sufficient to comply with the original lease. The parties knew it, too, and, by such ratification of the original lease, they put their stamp of mutual approval on performance of the then executed provisions. Said provisions originally executory are now become executed and approved, and in so far as they related to erection of the original building, its materials, its cost and its meagre specifications, these provisions are *functus officio.* (1902) *Holt* v. *Fleischman,* 74 N. Y. Supp. 894.) Thus, after erection of the first building, there remain no stipulations as to the nature, the cost or the

material of any other future building except in case of fire. Pursuing respondent's contention, however, if the tenant may tear down voluntarily to rebuild, the tenant can erect some new building, unlimited in almost any respect by the leases. Can it be conceived that the landlords intended their tenant to rebuild the first building upon the same plans in case of fire, but to be totally unrestricted as to what it could build in case of voluntary destruction? The parties inserted a careful provision to cover the only allowable instance of removal—fire. They omitted any provisions whatever concerning voluntary removal; they did not contemplate such possibility.

Finally comes the covenant of the landlords to pay the tenant for the building at the end of the term. What building?

Here we must read the whole lease with the particular covenant, and put ourselves in the place of the parties, realizing that the exact scope of the project was known to all parties in 1886 and was crystallized by 1890. They then could make some estimate of the maximum amount the reversioners must pay. To believe that a fee owner would turn the use of his land over to a tenant with concomitant power to erect any sort of building of unlimited cost, simultaneously agreeing to pay for such building and it possibly erected a very few years before the end of the term, would be to believe improvidency bordering lunacy. Suppose a future tenant should build a railroad station costing $100,000,000 five or ten years before the term expires: can it be thought the reversioners intended to pay for that? Not at all; they agreed to pay for the only building ever authorized—the building on the premises when the leases were made in 1887 and remade in 1891.

(c) The Building, as and When Constructed, Became and Is the Landlords' Property.

(1865) *Kutter* v. *Smith*, 2 Wall. 491.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

The reference is made to remove any possible misconception that perhaps the tenant ought to be able to do as it chooses with its own property. It is *our* building the respondent seeks to destroy—a building of which the respondent has only the *use*. If it be, as we deny, that the building is not maintainable by reason of inadequate design, the fault is the fault of the respondent who, under contract, planned and erected it, knowing full well that brick by brick it became the landlords' property for all time.

(d) The Covenant to Keep the Building in Repair Would Be Broken by Voluntary Removal, Even Though the Removal May Not Be Presently Injurious.

Covenants in the lease in (1897) *Bass* v. *Metropolitan West Side Elevated Co.* 82 Fed. 857, are in most particulars similar to the covenants in the Auditorium leases, especially the covenants to rebuild or to keep the structure in good repair. The Circuit Court of Appeals in Illinois, in the *Bass* case, held that covenants like the above, coupled with facts also similar to those here found, did not permit removal of a small portion of the building, even though not injurious to the reversion. At the top of page 862, it is declared:

> "* * * it is clear upon the whole instrument that in no event was a removal from the premises of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceiv-

> able contingency can there arise under the contract a right on the part of the lessee to remove the building, even were it a physical possibility to do so."

And this remains true, though such removal might be for the purpose of replacing the existing building by a better one. The *Bass* case alone should be sufficient authority. However, reference may be had to (1885) *Dooly* v. *Stringham*, 4 Utah, 107; 7 Pac. 405; (1884) *Davenport* v. *Magoon*, 13 Ore. 3, (1911) *Abel* v. *Wuesten*, 143 Ky. 513; 136 S. W. 867.

In passing, some inquiry may be made as to whether the building the tenant here says it proposes to erect is, for all pertinent purposes, really a better one. The landlords are concerned about the reversion as well as present security. A new, specialized, screen-walled hotel or similar skyscraper may afford greater net revenue than the existing building, but its physical life may be much shorter than the edifice of granite and stone now standing. At the end of the term, it is highly probable the present structure, if kept in repair, will be in better condition than would a skeleton of steel covered by a terra cotta shell. So, when using the word "better," the tenant really means better in the sense of immediate revenue and use, and forgets that no one can predict what will be better at a later time.

(e) The Leases Specify the Exact Security Assured to the Landlords for Performance by the Tenant; Any Other Security Is Negatived.

The leases provide (R. 42, 58, 78, 97) that if default shall at any time be made by the tenant in performance of any covenant to be kept by it, including payment of rent, rebuilding after fire and insuring, the landlords shall have a right to declare the term ended and to re-

enter, meaning and intending thereby to give the landlords a valid and first lien upon the leasehold, and in event of such re-entry the landlords are relieved from their obligation to pay any compensation for the improvements.

Further to maintain this security, the tenant covenants to keep the building in good repair and in a safe and secure condition, and the rooms in a good, safe, clean and tenantable condition and repair during the entire term, and to maintain insurance above fixed minimums, and to rebuild or repair the building, in case of fire, within two years upon the same plan as before the fire or upon such other plans as the landlords might approve. Any insurance collected is payable to the landlords and not deliverable over to tenant unless and until the fire loss is physically repaired or replaced. The owners protect themselves in the event of fire loss and again are careful in demanding restoration in kind and the custody of the insurance proceeds until their architect certifies to the restoration of the same building or one they have approved.

The care and forethought expended in these provisions evidence an affirmative intention as to exactly what their security shall be, and, under the rules of law above noted, operate just as efficiently to contradict the idea that any other security ever can be substituted. But the respondent seeks to have a court, by decree, declare that the building may be torn down; that the only security we ever agreed to accept be taken away from us; that other and different security (presumably bonds) be forced upon us and upon the bondholders during demolition and reconstruction, and that eventually we shall get a new building costing many millions for which we must pay. That, we should urge if and when the issue is presented, is not permissible and is not within the judicial

power. That, we say, would be the destruction of our contracts and the making of new contracts by judicial coercion.

But, argues respondent, the very duration of the term necessarily inculcated the notion of replacement. To support that assertion, counsel mention cases that are not in point at all because in those cases the buildings were invariably of temporary or different nature. Thus in *Doherty* v. *Allman*, L. R. 3 App. Cas. 709, the term was 999 years and the building was an old grain barn. Other cases involved business houses or dwellings. How different is our situation with a structure built like a castle! "Stone such as was used in the exterior construction of the building as to durability is considered the most permanent of the building stones of limestone nature, almost equal to granite," testified Edward A. Renwick. (R. 394.) Later he said:

> "My opinion is that it will remain two hundred years safe and secure with ordinary attention to wear and tear."

The permanency of a monument was sought and obtained in the construction of the Auditorium because it was designed and intended to stand as a semi-public institution. No similar building in Chicago or anywhere else ever had been torn down at the time. (R. 371.) The idea would have been repudiated with abhorrence had it ever been suggested to the original parties as a future possibility.

"Shall rebuild or repair the same upon the same plan" speak the contracts, which is very different from the covenant in the lease construed in *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97, cited by respondent. There, held the court, the main object of the stipulations of the leases was simply to maintain the security for rent and the restoration of the property in an unimpaired value at

the end of the term. "They were dealing with the security of values" (per Judge Severens, p. 100). So long it was held, as the tenant maintained security, he was not obligated after destruction by fire to restore the identical buildings. The case at bar does deal with security to landlords and to bondholders, indeed; but there is here a further compelling element—that of intention of all parties that the building as planned and completed should stand or be replaced for definite institutional uses.

(f) A Tenant Who Has Covenanted to Keep a Building in Repair Must Do Whatever Is Necessary to Maintain the Building, Even as Against Vis Major; Much More, Then, Against the Tenant's Own Acts.

(1875) *Ely* v. *Ely*, 80 Ill. 532.
(1908) *Bushwick Realty Co.* v. *Sanitary Co.* 114 N. Y. Supp. 13.
(1912) *Jacobs* v. *McGuire*, 136 N. Y. Supp. 64.
(1911) *McKinley* v. *Jutte & Co.* 230 Pa. St. 122; 79 Atl. 244.

It is no excuse that respondent may have constructed an auditorium building presenting unusual difficulties to maintain in good repair. Design and construction were respondent's own acts.

(g) "Changing Circumstances," "Hardship," "Lack of Commensurate Return," Etc., Urged by Respondent, Do Not Excuse Nonperformance of Explicit Covenants in the Contracts, and Especially Do Such Facts, Even if Proven, Not Empower Any Court to Condone Nonperformance by Implying New or Different Covenants.

(1865) *Ingle* v. *Jones*, 69 U. S. 1.
(1869) *Sheets* v. *Selden*, 7 Wall. 416.

(1919) *Columbus Ry. Co.* v. *Columbus*, 249 U. S. 399 at 411.
(1896) *Blake* v. *Pine Mt. I. & C. Co.* 76 Fed. 624 at 638.
(1895) *Postal Telegraph Co.* v. *Western Union Telegraph Co.* 155 Ill. 335.
(1925) *Keough* v. *Peck*, 316 Ill. 318.
(1924) *Calthorpe* v. *McOscar*, 1 K. B. 716; 93 L. J. K. B. 273.

None of the cases cited in respondent's brief detracts from the principle. Suffice it here to note that *Rector* v. *Rector*, 201 N. Y. 1 (Respondent's Brief, p. 64) is not the law in Illinois which has no such statute as New York; that *McArthur* v. *Hood Rubber Co.* 221 Mass. 372 (Respondent's Brief, pp. 40, 63, 124) was an *ex parte* proceeding, rendered inapplicable as a precedent here by *Riverbank Improvement Co.* v. *Chadwick*, 228 Mass. 242, and that all other similar decisions mentioned by respondent's counsel or by the Circuit Court of Appeals are foreign to the Illinois subject matter.

Furthermore, the facts themselves under this heading are most seriously controverted. We have shown that the changes in the environment of the Auditorium Building have been to its advantage, not its detriment; that for forty years Chicago's business district has been growing up to, not away from, the Auditorium; that it is now surrounded by the finest buildings, hotels, shops and theaters; that in its commanding position along the famous Michigan avenue sky-line of skyscrapers it is outstanding in beauty of line; and that architecturally it continues ever to be an artistic credit to any great city. Respondent's president admits (R. 245-9) that it con-

tains an unsurpassed auditorium, which is the purpose for which it was created.

We have further shown that financially the Auditorium Association is in the best condition of its existence; that the Association was never intended to earn pecuniary profits; that it has quick current assets of $575,843.85 as shown by its last available balance sheet, and that only the processes of bookkeeping, recently installed to prevent payment of income taxes, have developed charges for depreciation which, on paper, present the basis for averments of great losses. Taxes have risen, but so have rents and other income. Excepting for the revised post-war system of accounting, the Association shows a net plus surplus in earnings of over $493,000 during 1919 to 1924. On December 31, 1924, the Association owned securities, largely government bonds, aggregating $367,000; had cash on hand of $160,000, and other admitted assets aside from its leasehold.

We are not to be understood as contending that the respondent's financial condition is all its present stockholders could ask, or that with the commercial building they would like to erect the earnings might not be much greater. But we are to be understood as declaring the evidence shows that the Association *is* able to continue in its present quarters and to perform its obligations.

As to stability of the building, there is much testimony, with some divergence. Respondent failed to prove the building now or ever unsafe; it is constantly in use, housing hundreds of office tenants, thousands of hotel guests, tens of thousands of theater attendants. It has stood nearly forty years with never an interruption. There has not been a fracture of any ma-

jor structural member. The margin of safety of materials has overcome alleged overstresses. No column, truss, beam or girder has ever showed any sign of failure. Settlement has virtually ceased; what little there has been since the year 1915 is measured in hundredths of a foot, and causes no apprehension to the Association's own architect. Such running repairs as are necessary or ascertainable for the future can be made. The most that has been shown by respondent is, as Judge Wilkerson indicates, that *without repairs* there is reasonable ground to believe it *will* become unsafe; but the tenant is obligated to and must make those repairs.

Upon the facts, the situation of the Auditorium Building does not bring it within the doctrine of any decision submitted by respondent's counsel, and, as we have said, none of their decisions is here applicable.

(h) The Tenant's Program, Which the Courts Are Asked to Declare Lawful, Violates the Law of Waste.

(1897) *Bass* v. *Metropolitan W. S. E. Co.* 82 Fed. 857.

(1900) *Williams* v. *Chicago Exhibition Co.* 188 Ill.; 19 (*semble*).

(1832) *Winship* v. *Pitts,* 3 Paige Ch. 259.

(1921) *McDonald* v. *O'Hara,* 117 Misc. Rep. 517; 192 N. Y. Supp. 545.

(1910) *Hamburger* v. *Settegast,* 62 Tex. Civ. App. 446; 131 S. W. 639.

(1911) *Abel* v. *Wuesten,* 143 Ky. 513; 136 S. W. 867.

(1884) *Davenport* v. *Magoon,* 13 Ore. 3.

(1920) *Woolworth Co.* v. *Nelson,* 204 Ala. 172; 85 Sou. 449.

(1899) *Melms* v. *Pabst Brewing Co.* 104 Wis. 7.
(1913) *Cawker* v. *Trimmel,* 155 Wis. 108; 143 N. W. 1046.
(1859) *Parkman's Adm'r* v. *Aicardi,* 34 Ala. 393.
(1885) *Dooly* v. *Stringham,* 4 Utah, 107; 7 Pac. 405.

Counsel for respondent emphasize that English rules about waste and the alteration of demised premises are not applicable to American conditions, but, curiously, nearly all of the decisions on the point relied on by respondent are English cases. We can, if ever the time comes when the merits of this case are properly presented, distinguish the English cases. But the above considerable list of American decisions bears out our contention that the respondent asks the court to permit it to commit waste. See, also, 1 Tiffany, Landlord & Tenant, pp. 716-7; Jones, Landlord & Tenant, Sec. 632, and McAdam, Landlord & Tenant (4" Ed.), 1284.

No useful purpose would be served, we think, by prolonging this discussion of questions not properly before the Supreme Court. We have only touched upon some of our contentions; we have barely summarized our ideas of the evidence; we could and should have much more to say if the so-called merits of the case were involved in this review.

We believe we have said enough to convince the court that the substantive equities should be decided, if jurisdiction ever exist in a court, only after careful consideration and a full hearing in the lower courts. And we further believe our outlined points and the many authorities barely noted thereunder will, in any event, bear out the validity and justice of the petitioners' position.

D. THE EQUITIES OF THE CASE.

Counsel for respondent have painted a picture in which the Chicago Auditorium Association is made to appear as having been deprived of deserved advantages by an unconscionable refusal of the landlords to permit rebuilding. Heretofore, counsel for respondent have said:

> "What the lessors want is to get rid of the leases, or to force the lessee to enter into new leases at a higher rent."

It now seems fair to deny the assertion and to rebut the charge with facts. The petitioners never have made any attempt to get rid of the leases and they are not trying to force the tenant to enter into new leases at a higher rent.

So long as the Auditorium continues in the use for which it was intended, and so long as the tenant performs its covenants, the petitioners remain contented. They are not trying to force anything. Their protest arises only when the tenant seeks to discontinue that use, which result, its counsel concede, is not possible without the intervention of a court to strike out covenants of the leases and to write in new ones. The petitioners do admit the program of their tenant, if carried out, requires new leases or some definitive rearrangement by contract, but they insist that no court has the power to make the rearrangement. It is a proper subject for bargaining, and not for the infliction of judicial force.

Comment has been made that while Mr. Clinch talked with Mr. Willing (R. 253-4), the latter made no mention of any desire to have the Auditorium retained for its institutional purposes. That topic was not involved in the conference, and had expression of any such view been advanced by Mr. Willing the words would have fallen on

deaf ears. Replying merely to the business proposal, the landlords had in mind these considerations:

Take the Willing fee comprising about 80 per cent of the entire ground area. It was purchased by Wirt Walker, one of the Auditorium organizers, and the Chicago Auditorium Auxiliary Co., and James R. Walker, prior to 1887. These men are no longer alive, but the name of the auxiliary company and participation of the Walkers is sufficient indication that their purchase was part of the general scheme to provide an auditorium for Chicago, and that they expected eventually to sell the fee, get their money out, and let the Auditorium carry the land by payment of rent. The fee was sold on March 17, 1890, to Henry J. Willing, for $475,000 (Plaintiff's Ex. 9), subject to the leases made in January, 1887. But those leases fixed the value of the Willing fee at only $420,000 from 1886 to 1906—twenty years— and the rent during that period at 5 per cent on the $420,000. Why would Henry J. Willing pay $475,000 in 1890 for a yield of only 5 per cent on $420,000 for twenty years? Doubtless because he believed that the appraisement in 1906 under the Walker leases, with rental increasing to 6 per cent on the new valuation, would make up whatever loss he sustained on the $55,000 differential. Property values were gaining rapidly (Bradley testimony, R. 288), and were certain to increase continuously. The purchase at its inception promised a prospective good yield to Mr. Willing and permitted the organizers of the Auditorium enterprise to release their own funds.

But what took place just after this in the fiscal history of the Chicago Auditorium Association? Flatly put, it was facing bankruptcy. All estimates of cost had

been far exceeded. (Defendants' Ex. 1.) Additional construction and extras had augmented expenditures. An original stock issue of $750,000 and a bond issue of $900,000 dated February 1, 1889, had been exhausted. Stock was increased first to $1,500,000, and then to $2,000,000 in December, 1889, and $1,765,300 of it was sold at par. A month after Mr. Willing bought the fee, the Association floated $497,000 of 6 per cent debentures, and still owed $200,000. (Plaintiff's Ex. 21; R. 203.) The first annual report of earnings from office tenants came May 1, 1890; from the hotel March 1, 1891, and from the theater about January, 1891, and the situation a year after Mr. Willing's purchase became so acute that the board of directors met to find ways and means to save the institution. (Plaintiff's Ex. 21.) The suggested solution was a new bond issue consolidating all indebtedness—holders of the first mortgage bonds, holders of indentures and other creditors to accept, par for par, bonds of a consolidated issue of $1,600,000 due in 1942. But floating of the proposed new issue seems to have required some diminution of fixed charges involving concessions by the landlords. This is how it was done:

In July, 1891, Mr. Willing and the Association entered into a new agreement whereby Mr. Willing relinquished the revaluation clauses of 6 per cent by which he had expected to make commensurate return on his investment of $475,000 for a $420,000 income producer. His concession, made with the certainty that land values were advancing—Mr. Bradley (R. 288) tells that the Studebaker lots already had risen from $16,666.67 to $30,000—enabled the corporation to float its consolidated bonds and made it possible for the Auditorium to live for Chicago. It is inconceivable that Mr. Willing would

have consented to the elimination of the fulsome revaluation covenant and to an extension of the term for 100 years if anyone then had had the most remote idea that during the term the Auditorium ever would be replaced by a building designed for the private gains of the tenant and abandoning the chartered objects.

When the Association, equipped with a building designed for public and semi-public purposes, and burdened by debts threatening termination of its activities, besought aid, Henry J. Willing, as principal landlord, met the crisis more than halfway. The owners of the Sears-Slater corner joined in the rescue, for the same reasons and to the same end. The Studebakers, being nonresidents of Chicago, cared less for the city's aspirations, and we find them still clinging to their revaluation clause, getting for their narrow Michigan avenue frontage about as much rent as the other landlords put together.

Our point is not that Mr. Willing and the Sears-Slater interests were philanthropists in 1891 and by reason thereof now are entitled to especial favors. Our point is that the landlords, when apprized of the financial condition of the Association in 1891, realized that if the Auditorium was to continue, they must make concessions. Whether any civic pride in perpetuation of the enterprise entered into their considerations then is not our point. We treat it as a purely business proposition: the landlords desired to keep their tenant, and the tenant desired to finance itself, and both contemplated continuance of the Auditorium Building. To that end, they again bargained, and to that end the petitioners consented to elimination of revaluation clauses, in the belief, with the understanding and in the expectation that the identical undertaking should go on and on and

on throughout the term. If either landlords or tenant on July 9, 1891, ever had mentioned, or if the landlords had even imagined, that the land would later be put to a use differing from the then Auditorium, the exigencies of the times would have been met by temporary modifications and all provisions preserving the value of our investment in event of subsequent altered uses would have been retained.

When in 1922 it was revealed that a proposed new building would abandon the original ideals and would serve first, last and only the financial aggrandizement of the tenant, then indeed did the owners make protest unless they, too, were permitted to share in the division of the unearned increment.

Nor was there anything unfair in their offers. They were more than fair. For instance, the respondent (R. 286) values the two Willing fees now at $3,118,000, and the Sears-Slater fee at $500,000. Mr. Willing (R. 253) mentioned selling for $1,500,000—less than half its value; and the Sears-Slater trustees offered to negotiate on a basis of $350,000. On a revaluation basis, the Willing fees, now yielding exactly $30,000 a year rent, would, on a conservative basis, bring in more than $180,000; and the Sears-Slater fee, now yielding $14,000 a year, would bring in at least $30,000. No one knows what the future promises. Values probably will ascend. But suppose there is no increase: there is a present difference between the rents received on the flat figures established in 1891 and the rents the landlords would be receiving under the revaluation provisions amounting to over $166,000 annually. Multiply that by the 160 years of the term still to pass, and we find a minimum of $26,560,000 unearned increment which the court is asked to turn over in its entirety to the tenant by de-

creeing it the permission to tear down our building and to abandon the objects which persuaded us to eliminate the very clauses which, if retained, would unassailably place that $26,560,000 in our lawful possession.

These are facts and some aspects of this Auditorium case not portrayed in the picture drawn by the respondent. They are very vital and persuasive factors. The only possible way by which any court can permit the tenant to tear down our building, change the security of landlords and bondholders during demolition, and substitute another wholly different building, is for that court to make to some extent a new contract between the parties.

However, we are not asking any court to do any affirmative act. We made no complaint about lack of return commensurate with the present value of our fees. We were content to go along. But when our tenant seeks to have a court revamp the relationship wholly to the tenant's gain at our expense, our endeavors to resist the tenant's unwarranted application to the courts for the purpose must, we confidently submit, be deemed as equitably meritorious as they are legally sound.

Respectfully submitted,

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Office Supreme Court, U. S.
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CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

No. 561

MARK SKINNER WILLING, ET AL.,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

WALTER L. FISHER,
WILLIAM C. BOYDEN,
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Counsel for Respondent.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

PAGE

Statement 1

Role allotted to respondent 7

Equitable jurisdiction not a local property rule 8

Alleged conflict with decision of this court 9

What is a justifiable controversy 11

The precedents 15

Federal jurisdiction 18

Conclusion 20

Table of Cases.

Bacon v. Felt, 38 Fed. 870 19

Barney v. Latham, 103 U. S. 205 19

Bates v. Carpentier, 98 Fed. 452 19

Bedford Stone Company v. Oman, 134 Fed. 441 13

Blair v. Chicago, 201 U. S. 400 13

Boatman's Bank v. Fritzlen, 135 Fed. 650 19

Brooks v. Clark, 119 U. S. 502 19

Brown v. Cox, 158 Ind. 364 13

Carothers v. McKinley Mining Co. 116 Fed. 947 19

Clark v. Smith, 13 Pet. 195 9

Deepwater Ry. Co. v. Western Pocahontas Co. 152 Fed. 824 19

Devine v. Los Angeles, 202 U. S. 313 10

Fulwiler v. McClun, 285 Ill. 174 ..... 9, 11, 15

Gavin v. Curtin, 171 Ill. 640 ..... 9, 11

Geer v. Mathiesen Alkali Works, 190 U. S. 428 19

Guffey v. Smith, 237 U. S. 101 9

Holland v. Challen, 110 U. S. 15 17
Hygrade Provision Company v. Sherman, 266 U. S. 497 14
McArthur v. Hood Rubber Company, 221 Mass. 372 16
McConihay v. Wright, 121 U. S. 201 9
McMullen v. Halleck Cattle Company, 193 Fed. 282.. 19
Ohio Tax Cases, 232 U. S. 576 13
Pacific Railroad Removal Cases, 115 U. S. 1 19
Packard v. Banton, 264 U. S. 140 14
Rector v. Rector, 201 N. Y. 1 16
Risty v. Railway Company, 270 U. S. 378 13
Road District v. Railway Company, 257 U. S. 547.. 19
Schwab v. St. Louis, 310 Mo. 116 17
Shaffer v. Carter, 252 U. S. 37 13
Sharon v. Tucker, 144 U. S. 533 ..... 11, 15
Slegel v. Herbine, 148 Pa. St. 236 17
Terrace v. Thompson, 263 U. S. 197 14
Truax v. Raich, 239 U. S. 33 14
Tyson v. Banton, ... U. S. 14
Vaca Valley Company v. Mansfield, 84 Cal. 560 13
Voss v. Murray, 50 O. St. 19 17
Young Ex parte, 209 U. S. 123 14
Young v. Southern Pacific Company, 15 Fed. (2d) 280 19

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STATEMENT.

The controversy in this case is one between private parties, involving no question of public policy and no decision of any court falling within the specifications of paragraph 5b of Rule 35 of this court. There is nothing in the rules or decisions of this court to warrant the application for a writ of certiorari, especially in the absence of any final decree in either of the courts below.

The respondent, Chicago Auditorium Association, erected the Auditorium building about forty years ago upon a site occupied by it under leases which now run until the year 2085. The land was vacant, and the lessee acquired the right to use it for any lawful purpose not prohibited by the leases. The only pertinent qualification which they impose upon the free and unre-

stricted use of the property is found in a covenant to erect a substantial fireproof building of a stated minimum cost, the character of which is not otherwise specified, and to keep the building on the demised premises at all times during the term in good order and repair. The Auditorium, though erected in compliance with the requirements of the leases and accepted by the lessors as such, was built on the eve of the development of the modern art of steel construction, and before the engineering problems involved in such large and massive edifices had been solved. (R. 346-7.) Like many less pretentious buildings of that era, the Auditorium proved in the course of years to be structurally unsound, as well as inadequate for the purposes for which it was designed. The result is thus summarized in the opinion rendered in the District Court.

> "Because of fundamental defects in the construction of the building, it will continue to deteriorate, and there is reasonable ground to believe that it will become unsafe. * * * In short, the building has passed into the class of old buildings which are being torn down in the central district of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected."

The equitable jurisdiction of the District Court rests upon the concrete case presented, and cannot be determined without a consideration of the facts. These are recited by the District Judge in his opinion, especially in the summary, reprinted on pages 32 to 35 of the petitioners' brief, of "the facts averred in the pleadings and established by the evidence." These facts are undisputed, and we refer to the printed record only for such facts as are not recited in the opinion.

The Association has an obsolete, unprofitable and prospectively ruinous building which, if the petitioners'

claim is sound, must be perpetuated for more than one hundred and fifty years to come. Its ponderous masonry walls enclose an interior of cast iron columns and bolted beams and girders, all supported upon floating foundations. (R. 292.) The whole building has settled, but the subsidence of the heavy outer walls has been much greater than that of the interior, amounting in some places to about 28 inches. (R. 218, 221.) The settlement continues, though at a reduced rate (R. 221, 230), and may at any time be accelerated by excavations or building operations in the vicinity. (R. 340, 349.) The difference in the rate of settlement has caused fractures in the interior framework, and is likely to cause more in the future, while the resulting distortion sets up strains that are difficult to detect, and may at any moment develop unforeseen trouble. (R. 344.) It is only by the exercise of unremitting vigilance that the building has been maintained in a condition of safety. (R. 259, 364.) The methods of design and construction employed in the erection of the Auditorium were the best known at the time, but are inadequate and improper from a modern point of view. A building of such dimensions would now be of steel construction with caisson foundations extending down to bedrock. The present building could not be made sound and physically safe except by inserting caissons underneath it, and pulling out and reconstructing the interior. (R. 340, 346.) Such caissons could not be installed with any assurance of success, and the experiment would be both costly and hazardous (R. 340, 532), and, if carried to a conclusion without disaster, would result in the production of a building with few of the present feaures except the outer shell, but still obsolete in design, unprofitable in operation, and increasingly detrimental to the property.

The Auditorium when built was at the southern edge

of commercial development (R. 246), but the district where it stands is now the choicest in the City of Chicago. (R. 285.) The value of the land in that locality has enormously increased, taxes have risen from $22,707.78 in 1890 to $148,480.40 in 1923 (R. 379), and costs of operation are mounting continually. The rents reserved by the original leases were a certain percentage of ground valuations fixed and agreed upon by the express terms of the leases themselves (R. 35, 52, 70), and were full and adequate compensation for the use of the land under conditions then existing (R. 287); but with the growth of the city and the changes in the environment, the leasehold estates, if susceptible of proper improvement, are now worth several million dollars. (R. 287.) The present building, however, is a detriment to the property and adds nothing to its value. (R. 234, 289, 343.) The land would be better without the building than with it. (R. 288.) The theater, originally designed to accommodate large gatherings, is no longer adequate for the purpose. (R. 235.) It has been superseded by large audience halls (R. 236), and its utilization is increasingly difficult. (R. 236.) The hotel and office portions are inadequately lighted; the elevators and the heating and wiring systems are inefficient; the finishing is old-fashioned and out of date; and the building is wholly unsuitable to modern conditions. The only return it ever paid to its stockholders was a dividend of one and one-half per cent in 1893, the year of the World's Fair. (R. 234.) The outstanding capital stock issued and paid for at par is $1,765,300, from which, together with the proceeds of the bond issues, the cost of the building, amounting to over $3,000,000 (R. 273), was defrayed. The Association has a bonded indebtedness of $1,375,000, of which $834,000 will be due February 1, 1929 (R. 205), and it has never been able to set aside a sinking fund for

retirement of those bonds. (R. 277.) It has with difficulty been able to meet its ground rents, interest payments and the increased burden of taxes (R. 234), and its total assets, except a contingent fund of about $375,000 (R. 244, 256), are substantially represented by the value of its leasehold estates. (R. 243, 244, 276.)

The only way in which the Association can realize a return on its property is by substituting for the present structure a modern building of increased height, constructed in accordance with present engineering methods and adapted to the altered conditions and the changed environment; otherwise it is confronted with financial ruin. Such an enterprise will require not less than $10,000,000. The funds are available when legal obstructions are removed; but the Association is now unable to take even the first step towards the realization of its plans because bankers whose aid must be invoked know that the lessors dispute its right to proceed with the improvement, and until the doubts are dispelled the Association must continue to be deprived of all beneficial use and enjoyment of its property. (R. 289.) It is the contention of the petitioners that the only way in which the Auditorium Association can obtain an adjudication of its right to replace the present obsolete building with a modern improvement is by actually beginning to tear down the old building (of course, without having been able to make any of the necessary financial arrangements), and then, if a forfeiture of the leases is asserted, by litigating the question whether the leases have been forfeited in fact. This is what the petitioners regard as the sole remedy available to the respondent.

The disagreement between the parties to this cause about the basis and nature of equity jurisdiction is fundamental. The petitioners, and the Sears-Slater trustees who, though aligned on the same side of the controversy,

do not for tactical reasons join them in this application, visualize equity as a code of remedial forms which define and limit its jurisdiction. These forms of equitable action exist in legal contemplation, or perhaps *in nubibus*, as ideal entities empty of content, and equity is powerless to redress the misfortune of any litigant who cannot fit the facts of his case into one of those moulds. This respondent, while prepared to show that its case would meet even that formal test, founds its title to relief upon a concrete situation arising out of the actual facts of the case. Equitable remedies have been classified for convenience under certain heads, but these are descriptive of the jurisdiction as it exists, and do not operate as an outlawry of remedies omitted from the scheme of classification. Our position is and always has been that the question of equitable jurisdiction in this case cannot be determined apart from the question of plaintiff's title to relief, and should this application for a writ of certiorari be granted we are gravely in error if it will be any more possible for this court than it was for the Circuit Court of Appeals to dispose of the jurisdictional issue as a logical abstraction apart from the realities of the case.

If this court, departing from its customary practice, should grant a writ of certiorari in advance of a final decree, and should then remand the cause to the District Court for a decision on the merits, the effect would be to aggravate the respondent's predicament, the existence of which constitutes its claim to equitable relief and which grows more acute with every month of delay. The record already contains all the evidence that either party was able to adduce, there is no dispute about the essential facts, and this court, if it should grant the writ, might conceivably dispose of the entire controversy on the merits once for all, as was done under substantially identical circumstances in *Sharon* v. *Tucker*, 144 U. S. 533. At

all events, we do not believe the academic question of equitable jurisdiction can be abstracted from the facts upon which it rests, and we respectfully submit that no reasons have been adduced which would warrant the removal of the cause to this court at the present stage of the litigation.

While the petitioners dispute this respondent's legal right to improve the Auditorium site, their position here is that no matter how clear the legal right might be, a court of equity is powerless to make it effective. In disposing of the jurisdictional question a court must therefore either assume that the legal right exists or else determine by examination of the facts whether it does exist or not. On this preliminary application it must be assumed that the legal right claimed by the respondent was clearly established and is not subject to question. For all purposes of the present argument the respondent has a property right of great value, which it is unable to enjoy by reason of obstacles which an appropriate decree of equity would in fact remove. The burden rests upon the petitioners to show why equity is disabled from exercising its remedial powers.

I.

ROLE ALLOTTED TO RESPONDENT BY PETITIONERS.

This respondent declines the part assigned to it by the petitioners at the outset of their brief. Nothing is farther from the fact than that the respondent has ever "narrowed its contentions to the single theory that the lessors have clouded its title, and *therefore* equity has jurisdiction to remove the cloud." This respondent does maintain that its bill may, if necessary or desirable, be characterized as one to remove cloud from title, but our major thesis always has been that the remedial jurisdic-

tion of equity is not restrained by any catalogue of labeled precedents. That such was our position in the Circuit Court of Appeals could be shown by numberless quotations from our brief, of which one may suffice:

> "It seems to us an ignominious task, and one certainly never exacted by the Supreme Court of the United States from any litigant, to spend ink or breath over the question whether a meritorious case, in which the need of relief is so urgent, will fit into this or that mould, or indeed into any mould, devised originally for convenience in promoting and not for the purpose of defeating the ends of justice."

If the bill in this cause needs the conventional label of a stereotyped form, we think it may be pigeonholed with bills to remove cloud from title, but we refuse to be bound by the limits of that narrow argument. No doubt there are preconceptions on this subject which may need to be overcome and which perhaps influenced the District Court, but we think the Circuit Court of Appeals agreed that the arm of equity is not yet paralyzed by formalism. Our contention is that *when there is a legal right to the beneficial use of property, when obstacles prevent the present enjoyment of that right, when a decree of equity would in fact remove those obstacles without injustice to private individuals or violation of any principles of public policy, and when the courts of law afford no adequate remedy, the jurisdiction of equity is complete.*

II.

EQUITABLE JURISDICTION NOT A LOCAL PROPERTY RULE.

This suit was begun in the Circuit Court of Cook County, Illinois. Even if it were necessary to define the bill as one to remove cloud, it was sufficient as such by Illinois law, and if it were not sufficient that fact would

be irrelevant after removal of the cause to the federal courts.

1. There is no rule of local law inconsistent with the decision of the Circuit Court of Appeals in this case. In Illinois, as elsewhere, equity has jurisdiction at the instance of a person who has a legal right to the beneficial use and enjoyment of property, but who is prevented from exercising that right by obstacles which an appropriate decree of equity would in fact remove, and which can be removed in no other way.

Fulwiler v. *McClun*, 285 Ill. 174.
Gavin v. *Curtin*, 171 Ill. 640.

2. Were there a conflict between the decision of the Circuit Court of Appeals and cases decided by the Supreme Court of Illinois, the existence of such a conflict would be irrelevant here. No state can by the action of its courts or of its legislature narrow the definition of a cloud on title so as to curtail the inherent jurisdiction of a federal court respecting the removal thereof. If a state legislature enlarges the definition of a cloud on title, the relief accorded by the statute may be administered by a federal court; but no state can restrict the inherent power of federal courts to remove clouds from title, or to grant other equitable relief.

Clark v. *Smith*, 13 Pet. 195.
McConihay v. *Wright*, 121 U. S. 201.
Guffey v. *Smith*, 237 U. S. 101.

III.

ALLEGED CONFLICT WITH DECISIONS OF THIS COURT.

One ground upon which writ of certiorari is asked is the supposed existence of a certain decision of the Supreme Court of the United States. There is no such de-

cision inconsistent with that of the Circuit Court of Ap
peals. The solitary citation of *Devine* v. *Los Angele*
202 U. S . 313 illustrates the mischief of quoting languag
wrested from its context. The point there involved wa
one of federal jurisdiction, not of equity jurisdictio
The plaintiff resorted to a United States court on th
ground that certain statutes were unconstitutional, bu
inasmuch as the rights predicated on those statutes wer
merely part of an anticipated defense, the decision wa
that the plaintiff's own case did not involve a federa
question.

The petitioners, however, without laying much stres
upon that case, resort under this head to a general argu
ment about the nature of clouds on title. The right t
relief is said to depend upon plaintiff's ability to la
hands on some metaphysical entity which a decree o
court would "remove." This is an argument calculate
to reduce to despair anybody who hopes to find a relatio
between jurisprudence and sound reason. That plain
tiff has the legal right to rebuild is granted by hypothe
sis; that it is prevented from doing so by doubts abou
that right is conceded; that a decree would in fact, with
out injustice to anybody, reinstate plaintiff in the en
joyment of this right cannot be denied; that no relief i
possible except through such a decree is manifest. Th
path to justice is alleged to be obstructed by a multitud
of legal maxims, appropriate no doubt to the situation
in which they originated, which, it is asserted, interpos
unsurmountable barriers to relief. Their inapplicabilit
to the present case can be shown in detail, but the demon
stration would far exceed the limits prescribed for thi
preliminary brief.

IV.

WHAT IS A JUSTICIABLE CONTROVERSY?

One of the main arguments of the petitioners is that the object of the bill is to obtain a declaratory judgment on moot questions about which there is no formal controversy. It is said that there is no assertion of adverse claim; that any such alleged assertion was merely oral; and that equity cannot declare rights in advance of a controversy respecting their existence. This was the view of Judge Wilkerson, as shown by the following sentences selected from his opinion:

> "It is of course elementary that the court is without power to construe these leases unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. The plaintiff must ask that the defendant be decreed to do something. Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity."

If those propositions are elementary in actions at law or in any departments of equity they certainly are not elementary in the exercise of equitable jurisdiction as such. The ownership of property includes a right to its beneficial use; that right is coeval with the ownership and does not come into being for the first time when somebody disputes it; and one of the ordinary and most useful functions of equity is to render such a right available by the removal of obstacles to its enjoyment, no matter whether these obstacles are created by the wrongful acts of others or not.

Gavin v. *Curtin*, 171 Ill. 640.
Fulwiler v. *McClun*, 285 Ill. 174.
Sharon v. *Tucker*, 144 U. S. 533.

In the case last cited the owners of a title acquired by adverse possession obtained a decree establishing their right as against the holder of the patent title, who did not contest the suit and had not in any way disputed the rights asserted in the bill. The court in affirming the decree said:

> "The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. * * * As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment."

Equity regularly intervenes at the instance of an owner of valuable property rights for the purpose of removing obstacles to their free enjoyment, and this jurisdiction does not depend upon the rights being controverted nor require the court to order anybody to do anything. An ordinary foreclosure suit need not satisfy either of those conditions; indeed, the entire theory of parties in equity refutes the proposition that equity exists merely to redress wrongs or compose quarrels. This respondent is now deprived of the beneficial use and enjoyment of leasehold estates which, if susceptible of improvement, are worth several millions of dollars, but which are of little or no value while the respondent is prevented from exercising its legal rights by reason of the refusal of financiers and others to deal with it until a court of equity dispels the doubts arising out of the petitioners' claims.

If, however, jurisdiction were dependent on the active assertion of an adverse claim, the evidence is ample to satisfy even that condition. Interviews with the lessors had shown beyond the shadow of a doubt that they would resist any attempt of this respondent to rebuild. Negotiations in the modern business world are not framed in terms of direct defiance like a challenge to a duel. The iron hand is no less potent because concealed in a velvet glove. In any event, the answers explicitly denying the rights claimed by plaintiff in its bill (R. 168-170; R. 181-183) deprived the argument of any strength it might originally have had.

Blair v. *Chicago*, 201 U. S. 400, 449.
Bedford-Bowling Green Stone Co. v. *Oman*, 134 Fed. 441.
Brown v. *Cox*, 158 Ind. 364.
Vaca Valley Company v. *Mansfield*, 84 Cal. 560.

The notion has emerged in argument that equity cannot entertain a meritorious case when it involves issues which when isolated would not in themselves alone be sufficient to warrant the exercise of jurisdiction. The idea is refuted by a multitude of decisions. Equity will not entertain a bill to enjoin collection of an illegal tax, but the fact that such a tax must be enjoined is no bar to the jurisdiction of the court in a suit based on equitable grounds.

Ohio Tax Cases, 232 U. S. 576, 587.
Shaffer v. *Carter*, 252 U. S. 37.
Risty v. *Railway Company*, 270 U. S. 378.

Again it is frequently announced that equity will not enjoin a criminal prosecution, but it is no less clearly established that in a case proper for equitable cogni-

zance jurisdiction will not be refused because its exercise would involve such an injunction.

Ex Parte Young, 209 U. S. 123, 161.
Truax v. *Raich,* 239 U. S. 33, 37.
Terrace v. *Thompson,* 263 U. S. 197, 214.
Packard v. *Banton,* 264 U. S. 140.
Hygrade Provision Company v. *Sherman,* 266 U. S. 497.
Tyson & Bro. v. *Banton* ..... U. S. ..... (Feb. 28, 1927).

Judge Wilkerson in his opinion spoke of this case as one brought to construe leases, and interpreted the theory of the bill as coming to this, that:

> "Whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract."

Similar deductions are made in the petitioners' brief (p. 27) from the principles announced by the Circuit Court of Appeals. This difficulty appears to us to be altogether imaginary. The bill is not one to construe leases, but to obtain relief from an intolerable situation. If the court, in affording such relief, had to determine the legal effect of certain leases, it would not follow that the same court could be called upon merely to determine legal rights under the leases when no such situation existed.

V.

THE PRECEDENTS.

While jurisdiction in this case rests upon fundamental principles and not on the reiteration of rules of thumb, the actual decisions in cases most nearly approaching this upon the facts sustain the jurisdiction of equity.

The Illinois Supreme Court, after asserting, in *McCarty* v. *McCarty*, 275 Ill. 573, and other cases cited, certain of the general rules contended for by the petitioners, held expressly that they were inapplicable to a situation where a complainant was deprived of the present beneficial use and enjoyment of her property rights by obstacles which arose out of the terms of the instrument under which she claimed and which would in fact be removed by an appropriate decree.

Fulwiler v. *McClun*, 285 Ill. 174.

After reciting the facts on pages 175 and 176 of the report, the court disposes of the question of equitable jurisdiction in the following language (italics ours):

> "This was not a bill calling upon a court of equity merely to determine and declare a legal title, but it presented a case calling for the exercise of jurisdiction by the court, *on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her.* The court had jurisdiction, and the doctrine of *McCarty* v. *McCarty*, 275 Ill. 573, did not apply to the case."

Among the decisions of this court *Sharon* v. *Tucker*, 144 U. S. 533 has already been commented upon. Efforts have been made to discredit it as an authority in the present case on the ground that it was no more than a bill to perpetuate testimony. The opinion discloses that the jurisdiction was not ultimately dependent

upon any such narrow grounds, but even if it had been, the present record shows with equal cogency a case requiring for its support the testimony of many witnesses respecting the transactions of forty years ago.

The Supreme Court of Massachusetts also sustained the power of equity to remove as a cloud upon title a building restriction which had become obsolete by reason of changes in the district where the property was situated.

McArthur v. *Hood Rubber Company,* 221 Mass. 372.

The case most nearly parallel to this proceeding, and the one which exhibits in the clearest relief the broad and narrow views of equity jurisdiction, arose in the State of New York.

Rector v. *Rector,* 201 N. Y. 1.

Judge Wilkerson in the District Court adopted the more timid views advanced in the minority opinion, and it has been pointed out that the so-called majority opinion was concurred in by only three judges out of seven, while a fourth merely agreed to the conclusion without giving his reasons. We invite careful attention to this case, with entire confidence that the prevailing opinion will be recognized as the one which deals in realities, and to the comment thereon in the opinion of the Circuit Court of Appeals in the present case:

> "The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accordable to opinions of the majority of divided courts. * * * Its persuasiveness, however, lies not in its isolation or in its uniqueness, but in its appeal to conscience."

Established precedents are persuasive in equity as at law. It is one thing, however, to say that equity should follow settled precedents, and quite another to say that it ought not to give needed relief unless an exact precedent can be found.

The petitioners insist, if we understand them aright, that the bill is nothing unless it is one to remove a cloud from a title; that equity never removes clouds from a title which has not already been established at law; and that the respondent, having no means of establishing its title at law, is without remedy of any kind. A plaintiff out of possession, as in the *Subirana* case cited on page 24 of the brief, must establish his right at law before asking a court of equity for further relief. That proposition is elementary. But since the courts of law are not open in this case, the petitioners contend that by a policy of masterly inactivity they can force this respondent to rest in its present predicament forever. It may have a good legal defense to any action that might be brought against it, but the lack of remedy at law consists in the very fact that its adversaries will not or cannot bring suit. Waiting for a lawsuit which will never be brought is not in any view an adequate remedy at law. It is not the *assertion* of the adverse claim but the very fact of its *non-assertion* that furnishes the ground for recourse to equity.

Holland v. *Challen*, 110 U. S. 15, 24.
Schwab v. *St. Louis*, 310 Mo. 116.
Slegel v. *Herbine*, 148 Pa. St. 236.
Voss v. *Murray*, 50 Ohio St. 19.

VI.

FEDERAL JURISDICTION.

Finally it is insisted that this cause is not a proper subject of federal jurisdiction and should be remanded to the state court in which it originated. The active defendants in this cause occupy two camps. There are the Sears-Slater trustees, owning one part of the fee, and the Willing trustees, owning another part. Their interests are identical, but their tactics differ. Removal of the obstacles which obstruct the enjoyment of one leasehold estate would in no manner affect the other. The issues between the plaintiff and the two groups of defendants were and are distinct, but, as is always permissible when there is a determining point common to the entire litigation, the plaintiff elected to unite in a single suit controversies or causes of action which might have been prosecuted separately. The Sears-Slater defendants, claiming to have a separable controversy, removed the cause to the federal court, and after Judge Wilkerson had denied the motion of both groups of defendants to dismiss the bill for want of equitable jurisdiction the Willing interests moved to remand the cause to the state court upon the ground that no separable controversy existed. Thus the two groups of defendants, by a convenient division of labor, placed themselves in a position to allege error whichever argument prevailed. The motion to remand was overruled by Judge Wilkerson and has been denied by the Circuit Court of Appeals, and the Willing interests, being the only defendants who can with good grace renew the protest against federal jurisdiction, apply alone for a writ of certiorari.

A bill to quiet title, or for similar relief, which contains no allegation that the defendants claim jointly or

from a common source, or that any privity of interest exists between them, presents a separable controversy, the defendants being joined for convenience.

Bacon v. *Felt*, 38 Fed. 870.
Bates v. *Carpentier*, 98 Fed. 452.
Carothers v. *McKinley Mining Co.*, 116 Fed. 947.
McMullen v. *Halleck Cattle Co.*, 193 Fed. 282.

A plaintiff, having two causes of action which present a common and decisive point of litigation, may at his election prosecute them separately or combine them in a single suit. If he adopts the latter alternative and some of the defendants remove their separable controversy to the federal court, the whole cause is removed, and the other defendants cannot refuse to go into the federal court because they are all citizens of the same state with the plaintiff and might have been sued separately.

Barney v. *Latham*, 103 U. S. 205.
Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Boatman's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied, 198 U. S. 586).

Except in eminent domain or special assessment proceedings or other instances where distinct causes of action may be joined in one proceeding by authority of some special statute, the removal of a separable controversy carries the entire cause to the federal court.

Barney v. *Latham*, 103 U. S. 205.
Brooks v. *Clark*, 119 U. S. 502.
Road Dist. v. *St. Louis S. W. Ry. Co.*, 257 U. S. 547.
Pacific Railroad Removal Cases, 115 U. S. 1.
Deepwater Railway Co. v. *Western Pocahontas Co.*, 152 Fed. 824.
Young v. *Southern Pacific Co.*, 15 Fed. (2d) 280.

Conclusion.

This respondent respectfully urges that the decision of the Circuit Court of Appeals on the question of equity jurisdiction, now reported in 20 Fed. (2d) 837, was sound and right, and that the federal jurisdiction was properly sustained. No sufficient reason has been advanced for granting a writ of certiorari at the present juncture, certainly none of the reasons ordinarily assigned by this court for such intervention. There is no pretense that the case involves any questions of public importance. The petitioners assert that the opinion of the Circuit Court of Appeals conflicts with decisions of this court, with decisions of the Supreme Court of Illinois, and with decisions of the appellate tribunals of other federal circuits, but they fail to point out any such decisions. Any review by this court at the present time of the mere jurisdictional issues involved, followed by a further hearing in the District Court, by the inevitable appeal to the Circuit Court of Appeals, and by a further application to this court for a writ of certiorari, would entail a delay which would be disastrous to this respondent.

We request that the application for a writ of certiorari be denied.

Respectfully submitted,

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(20)

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561

MARK SKINNER WILLING, AND THE NORTHERN TRUST COMPANY, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED,

Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,

Respondent.

BRIEF FOR RESPONDENT.

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INDEX.

PAGE

The issues and their discussion 1

Statement of the case 5

Argument 15

I.

EQUITY JURISDICTION.

Essentials of equity jurisdiction 15

A legal right to the use of property is an incident of its ownership and not the result of a denial of that right 16

History of original writs and forms of action as limitations on the administration of justice 20

Partial emancipation through the device of legal fictions 24

Further emancipation through the growth of equity .. 26

Professor Pomeroy's analysis of equity 30

Doctrine that equity is limited by existing "heads of equity jurisprudence" relates to substantive rights and not to remedial forms 33

The bill of complaint considered as one to remove cloud on title 39

Alleged controlling effect of Illinois local law 42

Equity is not disabled from deciding an issue merely because that issue would not alone be sufficient to support the jurisdiction 49

Alleged incompetence of equity to remove as clouds adverse claims not asserted otherwise than orally 51

Alleged want of affirmative assertion of adverse claims in this case 54
Illustrations of circumstances under which equity removes clouds from title 59
The New York case of Rector v. Rector..... 64
Absence of remedy at law as basis of equity jurisdiction 66
What is an adequate legal remedy..... 68
Acting on a doubtful right, where a mistake would entail ruinous consequences, not an adequate legal remedy 70
Ability to defend an action at law which the opposing party does not bring is not an adequate remedy 71
Declaratory judgments 74

II.

FEDERAL JURISDICTION.

Removal of separable controversies 77
Separable controversies and indispensable parties.. 82
Distinction between decrees respecting the rights of particular persons in property, and those affecting the property in which those rights inhere..... 86
Multifariousness 89
Separable controversies in suits to quiet title..... 92
The mortgage trustee not an indispensable party to the removable controversy in this case..... 98

III.

PLAINTIFF'S RIGHT TO REBUILD.

Comprehensive statement of facts 102
General rights of a lessee to use of demised property 109
The law of waste 112
Rights under ground leases of vacant business property 113
Tenant's right with respect to improvements dependent on the circumstances of each case..... 116
Covenants of the leases 125
Covenants construed as security for rent..... 125
Covenants construed in accordance with public policy 130
Covenants construed in accordance with reason and justice 134
Implications from affirmative provisions of the leases in this case 136
Alleged effect of covenants to repair and rebuild... 139
Conditions and form of relief..... 143
Plaintiff's case not prejudiced by its offer to give security and do equity..... 143
The decree sought by plaintiff would not impose upon the court administrative duties beyond its competency 149
Conclusion 154

Table of Cases Cited.

Agate v. Lowenbein, 57 N. Y. 604 122
Alabama Southern R. R. Co. v. Thompson, 200 U. S. 206 91
American Coal Co. v. Indiana Cotton Mills, 78 Ind. App. 115; 134 N. E. 891 123
A. Leschen & Sons Rope Co. v. Mayflower Co., 173 Fed. 855 134
American Smelting Co. v. Bunker Hill Co., 248 Fed. 172, 182 151
Anway v. Grand Rapids Ry. Co., 211 Mich. 592; 179 N. W. 350 74
Antomarchi v. Russell, 63 Ala. 359 153
Atchison Ry. Co. v. Stamp, 290 Ill. 428 63

Bacon v. Felt, 38 Fed. 870 91-95
Bank of Kentucky v. Stone, 88 Fed. 383 73
Barney v. Latham, 103 U. S. 205 78-79-90-91-97
Barnsdall Oil Co. v. Leahy, 195 Fed. 731 134
Bass v. Metropolitan W. S. E. Railroad, 827 Fed. 857 118
Batchelor v. Hinkle, 210 N. Y. 243; 104 N. E. 629 124
Bates v. Carpentier, 98 Fed. 452 95
Bedford Stone Co. v. Oman, 134 Fed. 441 58
Bitterman v. Louisville Railroad Co., 207 U. S. 205 89
Blair v. Chicago, 201 U. S. 400 57-60
B. & O. R. Co. v. Voigt, 176 U. S. 514 131
Bonney v. Greenwood, 96 Me. 335; 52 Atl. 786 153
Brick v. Brick, 98 U. S. 514 131
Brown v. Cox, 158 Ind. 364; 68 N. E. 568 57
Brown v. Trousdale, 138 U. S. 389 86
Buckner v. Carr, 302 Ill. 378 46

Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 69
Carothers v. McKinley Mining Co., 116 Fed. 947 96
Carson v. Hyatt, 118 U. S. 279 101

Cary v. Cary, 309 Ill. 330 123
Chicago, R. I. & P. Ry. Co. v. Dobell, 229 U. S. 102 .. 91
City of LaFollette v. LaFollette Water Co., 252 Fed. 762 .....147, 150
Clark v. Smith, 13 Pet. 195 44
Cole v. Green, 1 Lev. 309 112
Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150 90
Construction Co. v. Cane Creek Township, 155 U. S. 283 87
Contee v. Lyons, 19 D. C. 207 63
Cowell v. Colorado Springs Co., 100 U. S. 55 131
Cronen v. Moore, 210 Fed. 239 148
Cropper v. Bowles, 150 Ky. 393; 150 S. W. 380 132
Crump v. Thurber, 115 U. S. 56 86
Curtiss v. Brown, 29 Ill. 201 123

Darcy v. Askwith, Hob. 234 112
Davidson v. Montana Dakota Co., 22 Fed. (2d) 688 .. 98
Davis v. Hone, 2 Sch. & Lef. 340 146
Denegre v. Walker, 214 Ill. 113 123
Dodge v. Cole, 97 Ill. 338 68
Doe v. Earl of Burlington, 5 B. & Ad. 507 113
Doe v. Jones, 4 B. & Ad. 126 138
Doherty v. Allman, L. R. 3 App. Cas. 709 .....
.....112-114-121-135-138
Dr. Miles Medical Co. v. Park, 220 U. S. 373 131

Egerton v. Brownlow, 4 H. L. Cas. 1 132
Elder v. Western Mining Co., 237 Fed. 966 90
Elmendorf v. Taylor, 10 Wheat. 152 83

Fick & Webb, 263 U. S. 326 71
Field v. Lownsdale, 1 Deady 288; 9 Fed. Cas. 4769 .. 93
Fort Scott v. Hickman, 112 U. S. 150 154
Fowle v. Park, 131 U. S. 88 131
Fraser v. Jennison, 106 U. S. 191 79

Fredenberg v. Whitney, 240 Fed. 819..... 73
Fulton v. Krull, 200 N. Y. 105, 93 N. E. 494..... 154
Fulwiler v. McClun, 285 Ill. 174.....19-47-49-63

Gavin v. Curtin, 171 Ill. 640..... 19
Geer v. Mathiesen Alkali Works, 190 U. S. 426....91-97
Gibbs v. Consolidated Gas Co., 130 U. S. 396..... 131
Gilmore v. Keogh, 241 Ill. App. 28..... 125
Goldsmith v. Gilliland, 24 Fed. 154..... 94
Goodenough v. Warren, 5 Sawy. 494; 10 Fed. Cas. 5534 93
Graves v. Ashburn, 215 U. S. 311..... 90
Gray v. Blanchard, 8 Pick. 284..... 131
Great Lakes Co. v. Scranton Coal Co., 239 Fed. 603.. 151
Greene v. Sisson, 2 Curt. 171; 10 Fed. Cas. 5768.... 87
Greenough v. Greenough, 284 Ill. 416..... 46
Guffey v. Smith, 237 U. S. 101..... 43
Gwinn v. Rogers, 92 W. Va. 533, 115 S. E. 428..... 110

Hagan v. Walker, 14 How. 29..... 87
Harkness v. Lisle, 132 Ky. 767; 117 S. W. 264..... 132
Harrison v. Owsley, 172 Ill. 629..... 46
Harrow School v. Alderton, 2 B. & P. 86..... 112
Hawes v. Favor, 161 Ill. 440.....115-128-135
Hay v. May Department Stores, 271 U. S. 318..... 91
Heartt v. Kruger, 121 N. Y. 386; 24 N. E. 841..... 153
Hobbs v. McLean, 117 U. S. 567..... 135
Holland v. Challen, 110 U. S. 15.....39-41-44-60-72
Holmes v. Millage (1893) Q. B. 551.....36-37
Hutchinson v. Ulrich, 145 Ill. 336..... 135
Hygrade Provision Co. v. Sherman, 266 U. S. 497... 49
Hyman v. Rose, L. R. (1912) App. Cas. 623..... 145

Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308.. 91

Jackson v. Bruns, 129 Iowa 616; 106 N. W. 1..... 153
Jones v. Chappell, L. R. 20 Eq. 539.....112-138
Joy v. St. Louis, 138 U. S. 1..... 150

Kearns-Gorsuch Co. v. Hartford Co., 1 Fed. (2d) 318 151
Kendig v. Brown, 94 U. S. 423 86
King v. Hobbs, 1 Yelv. 26 69
Klie v. Von Broock, 56 N. J. Eq. 18; 37 Atl. 469 118

Levy v. S. H. Kress & Co., 285 Fed. 836 59
Liberty Warehouse Co. v. Grannis, 273 U. S. 70 37
Louisville & Nashville R. R. Co. v. Ide, 114 U. S. 52 .. 91
Lovell v. Marshall, 162 Minn. 18; 202 N. W. 64 53

McArthur v. Hood Rubber Co., 221 Mass. 372; 109 N. E. 162 40-63-124
McCarty v. McCarty, 275 Ill. 573 47
McClure v. Leaycraft, 183 N. Y. 36; 75 N. E. 961 124
McConihay v. Wright, 121 U. S. 201 42
McMullen v. Halleck Cattle Co., 193 Fed. 282 97
Marsh v. Reed, 184 Ill. 263 123
Martin v. Fort, 83 Fed. 19 87
Mechanic's Bank v. Lynn, 1 Pet. 376 147
Melms v. Pabst Brewing Co., 104 Wis. 7; 79 N. W. 738 120
Merriam v. United States, 107 U. S. 437 135
Merrill-Ruckgaber Co. v. United States, 241 U. S. 387 135
Meux v. Cobley, L. R. (1892) 2 Ch. 253 123-137
Meyer v. Richards, 163 U. S. 385, 415 154
Miller v. Staggs, 266 Mo. 339; 181 S. W. 116 154
Moore v. Shoemaker, 10 App. Cas. (D. C.) 6 153
Moss Point Lumber Co. v. Board, 89 Miss. 448; 42 So. 290 112
Muskrat v. United States, 219 U. S. 346 74

Nash v. Towne, 5 Wall. 689 135
National Bank v. Carpenter, 101 U. S. 567 68
New Jersey v. Sargent, 269 U. S. 328 37
New York Central R. R. Co. v. Lockwood, 17 Wall. 357 131

Niles-Bement Co. v. Iron Moulders' Union, 254 U. S. 77 101
Noonan v. Bradley, 9 Wall. 394..... 135
North Carolina Mining Co. v. Westfeldt, 151 Fed. 290 96
N. Y. & N. H. Ry. Co. v. Schuyler, 17 N. Y. 592..... 59

O'Connor v. Thetford, 174 S. W. (Tex.) 680..... 132
Odd Fellows Assn. v. Hegele, 24 Ore. 16; 32 Pac. 679 153
Ohio Tax Cases, 232 U. S. 576..... 50
Oklahoma Operating Co. v. Love, 252 U. S. 331..... 70
Old Dominion Oil Co. v. Superior Oil Corp., 283 Fed. 636 98
Oman v. Bedford Stone Co., 134 Fed. 64..... 52

Pacific Railroad Company v. Ketcham, 101 U. S. 289 101
Packard v. Banton, 264 U. S. 140..... 49
Packard v. Illinois T. & S. Bank, 261 Ill. 450..... 123
Page v. Murray, 46 N. J. Eq. 325; 19 Atl. 11..... 124
Parker v. Shannon, 121 Ill. 452.....46-60
Partridge v. Gilbert, 15 N. Y. 601..... 153
Peirce v. New York Dock Co., 265 Fed. 148..... 135
Peugh v. Davis, 96 U. S. 332..... 131
Pierce v. Dyer, 109 Mass. 374..... 153
Pierce v. Society of Sisters, 268 U. S. 510..... 71
Pike v. Cincinnati Realty Co., 179 Fed. 97...122-127-141
Pirie v. Tvedt, 115 U. S. 41..... 91
Pope Mfg. Company v. Gormully, 144 U. S. 224.... 133
Porterfield v. Webb, 263 U. S. 225..... 71
Presby v. Benjamin, 169 N. Y. 377; 62 N. E. 430.... 110
Pressed Steel Co. v. Eastern Ry Co., 121 Fed. 609... 134
Pritchard v. Bailey, 113 N. C. 525; 18 S. E. 668..... 132
Pullman Car Co. v. Metropolitan Ry. Co., 157 U. S. 94 154
Pusey v. Hanssen, 261 U. S. 491..... 45
Pynchon v. Stearns, 11 Metc. 304.....112-116

Raphael v. Trask, 194 U. S. 272 86
Rector, etc. v. Rector, etc., 201 N. Y. 1; 94 N. E. 191 64
Rector, etc. v. Rector, etc., 130 App. Div. 166; 114 N. Y. Supp. 623 65
Rees v. Watertown, 19 Wall. 107 37
Risty v. Railway Co., 270 U. S. 378 50
Roberson v. Rochester Box Co., 171 N. Y. 538; 64 N. E. 442 36
Russell v. Clarke's Executors, 7 Cranch. 69 83
Rutland Marble Co. v. Ripley, 10 Wall. 339 150

Salem Trust Co. v. Mfrs. Finance Co., 264 U. S. 182 87
Schell v. Leander Clarke College, 2 Fed. (2d) 17 90
Schwab v. St. Louis, 310 Mo. 116; 274 S. W. 1058 ... 73
Seeley v. Baldwin, 185 Ill. 211 46
Shaffer v. Carter, 252 U. S. 37 50
Sharon v. Tucker, 144 U. S. 533 18-62-63
Sherman v. Fitch, 98 Mass. 59 71
Sherrill v. Connor, 107 N. C. 630; 12 S. E. 588 112
Shields v. Barrow, 17 How. 130 83
Shine v. Wilcox, 1 Dev. & B. Eq. 631 112
Sioux City Terminal Co. v. Trust Co., 82 Fed. 124 .. 84
Slegel v. Harbine, 148 Pa. St. 236; 23 Atl. 996 53-74
Smyth v. Carter, 18 Beav. 78 121
Stanbrough v. Cook, 38 Fed. 369 94
Stebbins v. Perry County, 167 Ill. 567 59
Steele v. Culver, 211 U. S. 26 101
St. Louis Ry. Co. v. Wilson, 114 U. S. 60 86

Terrace v. Thompson, 263 U. S. 197 49-71
Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 14 151
Thompson v. Emmett Irrigation District, 227 Fed. 560 51
Tobin v. Walkinshaw, 1 McAll. 26; 23 Fed. Cas. 14068 87
Toledo Ry. Co. v. Pennsylvania Co., 54 Fed. 746 67
Tooley v. Windham, Cro. Eliz. 206 69
Truax v. Raich, 239 U. S. 33 49

Union Pacific Ry. Co. v. C. R. I. & P. Ry. Co., 163 U. S. 564 149
United States v. Alaska Steamship Co., 253 U. S. 113 76
United States v. Hamburg-American Co., 239 U. S. 466 76

Vaca Valley Co. v. Mansfield, 84 Cal. 560; 24 Pac. 145 57
Vanderbilt v. Mitchell, 71 N. J. Eq. 632; 63 Atl. 1107 35
Vanderbilt v. Mitchell, 72 N. J. Eq. 910; 67 Atl. 97.. 36
Van Duyn v. Chase, 149 Iowa 222; 128 N. W. 300.... 135
Vassar College v. Loose Wiles Biscuit Co., 197 Fed. 983 38
Venner v. Southern Pacific Co., 279 Fed. 832.....92-98
Voss v. Murray, 50 Ohio St. 19; 32 N. E. 1112..... 71

Wadley So. Ry. Co. v. Georgia, 235 U. S. 651..... 70
Walker v. Converse, 148 Ill. 622..... 63
Warren v. Warren, 279 Ill. 217..... 47
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 88
Webb v. O'Brien, 263 U. S. 313..... 71
Willard v. Tayloe, 8 Wall. 557 147
Williams v. Bankhead, 19 Wall. 563..... 93
Wilson v. Oswego Township, 151 U. S. 56..... 87
Windemere Impvt. Assn. v. Bank, 205 Mich. 539; 172 N. W. 29 124
Winfield v. Wichita Natural Gas Company, 267 Fed. 47 97
Winship v. Pitts, 3 Paige 259 112
Wood v. Dummer, 3 Mason 308; 30 Fed. Cas. 17944 87
Wright v. Vocalion Organ Co., 148 Fed. 209..... 148

Young, Ex parte, 209 U. S. 123..... 70

Other Citations.

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IN THE

Supreme Court of the United States

October Term 1927.

No. 561.

MARK SKINNER WILLING, TRUSTEE, ET AL.,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR RESPONDENT.

THE ISSUES AND THEIR DISCUSSION.

At the outset we wish to state the issues in this case as we understand them and to explain the consequent character and extent of this brief. The vital issue, as we view it, is between the conception of equity as a system of rigid forms and precise precedents and the conception of equity as a system of living principles, definite

in character but flexible in their application to each particular case of which the facts and circumstances bring it within their broad general scope. Petitioners' brief is confined to the discussion of two questions of jurisdiction, one equitable and the other federal, with only such regard to the facts of the particular case as is required by the formalistic view of equitable jurisdiction. Even for this purpose petitioners' statement of the pleadings and of the facts is in our judgment inadequate and misleading. It is our view that the jurisdiction of equity was established and has been developed to relieve the administration of substantive justice from the deadening effects of formalism and to deal with the realities of human relations and affairs.

The disagreement between the parties about the basis and nature of equity jurisdiction is fundamental. The petitioners visualize equity as a code of remedial forms which define and limit its jurisdiction. These forms of equitable action are assumed to exist in legal contemplation, as ideal entities empty of content, and no litigant can find redress for his misfortunes unless he can fit the facts of his case into one of those pre-established moulds. While this respondent is prepared to show that its case would meet even that formal test, our position is and always has been that the present question of equitable jurisdiction cannot be abstracted from the plaintiff's title to relief, and we are gravely in error if this court, any more than the Circuit Court of Appeals, can be persuaded to dispose of the jurisdictional issue as a logical abstraction apart from the realities of the case.

We therefore deem it essential to ask consideration by the court of the history of this litigation and the actual situation it presents at much greater length than petitioners have considered necessary under their theory

of the law. In our view, the existence of equity jurisdiction is clear if there is in fact a legal right, the present beneficial enjoyment of which is in fact prevented or obstructed by an unwarranted obstacle, for the removal of which there is no adequate remedy at law but for which there is an appropriate remedy in equity. This case has been fully tried; and while "the facts averred in the pleadings and established by the evidence," as recited in the opinion of the District Judge, are doubtless to be conceded in the discussion of the jurisdictional question, they can only be given their proper force and effect by a much fuller statement.

On the question of equitable jurisdiction we are challenged to declare the principles upon which we rely and to show that these principles have been recognized and applied in analogous cases. This seems to us to require an historical and critical analysis of the nature and development of equity as concise as is consistent with clarity but sufficiently comprehensive to meet the challenge of petitioners' brief, as well as a review of the more important analogous decisions in which these principles have been recognized and applied. The question of federal jurisdiction requires a similar review of the statutes and authorities, especially the cases in which the federal courts have recognized the existence of separable controversies.

We do not, however, stop with these questions of jurisdiction. This case has been fully tried in the District Court. There are no controverted issues of fact the determination of which can affect its disposition upon the merits. We therefore devote a substantial portion of this brief (pages 102 to 143) to the merits of this controversy, and we respectfully urge that this court follow the precedent set by it in *Sharon* v. *Tucker*, 144 U. S.

533, and direct the entry of such a decree as it deems appropriate. We shall frequently refer to that case in this brief. It is sufficient here to point out that it was a bill to quiet title which was dismissed in the lower court for want of equitable jurisdiction, but that this court, premising that "there was no substantial disagreement between the parties as to the facts," reversed the decree and remanded the cause

> "with instructions to enter a decree declaring the title of the complainants to the premises described in their complaint by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to said premises through their former owner."

Our argument is an affirmative argument, in support of which we have already presented in two courts many authorities which are completely ignored in the brief for petitioners in this court. They cite many cases to establish general propositions which we do not controvert or discuss, except to point out that they have no valid application to the case at bar and that language quoted must be understood in connection with its context. Where this is clear from the leading cases, we have not thought it necessary or helpful to analyze and distinguish the merely cumulative authorities cited in petitioners' brief.

STATEMENT OF THE CASE.

On February 15, 1923, the Chicago Auditorium Association, an Illinois corporation, brought its action in the Circuit Court of Cook County, Illinois, to remove, as an obstacle to the present beneficial use of its 199-year leasehold property and as a cloud upon its title, certain claims of the petitioners here as its lessors; and, in accordance with the practice approved by this and other courts, it brought in, as proper although not necessary or indispensable parties, the owners of the fee of the other tracts which had been leased to it under similar leases, and which were occupied by parts of the same building, erected by the lessee, and now obsolete, financially unprofitable and prospectively unsafe.

For more than five years this plaintiff has been appealing to the courts for the definitive relief to which we believe it justly entitled. Its first mortgage bonds for more than $800,000 mature in February, 1929. After the negotiations which preceded resort to the courts had proved futile, and it was seen that the differences between the parties were too profound to be settled without litigation, the Association received the assurance of Mr. Willing, then as now its principal adversary, that if a bill in equity had to be filed he would do what he could to expedite the hearing and obtain an early decision as to the rights of the parties under the ground leases. The undisputed testimony of Mr. Clinch, president of the Association, was that "he said he would do all he could to hasten a decision; would not put any obstructions in the way." (R. 255.) After the bill had been filed, Mr. Willing and his co-trustee answered, admitting that, as alleged in the bill, "they claim and as-

sert that the present building cannot be removed without a violation of the terms, covenants and conditions of the leases." (R. 169.) In the memorandum in support of their motion to remand the cause to the state court made in the Circuit Court of Appeals after that court had decided the question of equitable jurisdiction against them they said:

> "Our position always has been and is that no court has any jurisdiction on any theory; that the issue is one for business dealing, not for judicial determination." (R. 638.)

This case was removed June 13, 1923, from the state court to the District Court of the United States by certain of the defendants, citizens of New York, upon the ground that the record disclosed a separable controversy between them and the plaintiff. Motions to dismiss the bill for want of equity jurisdiction made by various defendants were overruled by the court on the ground that the case should be first heard upon the merits after presentation of the facts. The written motion to dismiss made by the petitioners on that occasion gave as one of their reasons that the bill "is multifarious in that it joins as codefendants with these defendants persons not interested in or with respect to the so-called Walker leases." (R. 137-8.)

Nevertheless, the same Willing defendants (the petitioners here) then moved to remand the cause to the state court on the ground that the cause of action set forth in the bill of complaint is "single and indivisible," and that the bill discloses "no separable controversy between the complainant and the defendants joining in the petition for removal." (R. 194-5.) After a full hearing the District Judge dismissed the bill without prejudice because in his opinion it did not come "within some head of equity jurisdiction." On appeal to the Circuit

Court of Appeals before Judges Alschuler, Evans and Page, that court unanimously reversed the District Court on the question of equity jurisdiction, and sent the case back with directions "to hear the evidence and determine the issues involved." Certain defendants, including the petitioners, then filed in the Circuit Court of Appeals a motion for a rehearing and a motion to remand to the state court, both of which were denied, and the case has been brought here by writ of certiorari.

This suit was begun by the plaintiff in the state court against all the defendants interested in the Auditorium site, and according to the present position taken by the petitioners on the question of equity jurisdiction, plaintiff could not have brought separate suits against the different groups of defendants even if it had wished to do so. It stood neutral while some defendants removed the cause to the federal court, and while other defendants, at a time when the omens seemed to them unfavorable, strove to have it sent back to the state court. All the plaintiff has ever asked is an opportunity to be heard in any competent tribunal. Petitioners contend that "no court has any jurisdiction on any theory." We proceed to summarize the facts out of which this litigation arose.

The Chicago Auditorium Association was incorporated in 1886 (R. 198), with an authorized capital, as subsequently increased, of $2,000,000 (R. 199), and proceeded to acquire a site by leasing the necessary land from the owners of the fee, which was held in three separate interests. The property fronts east on Michigan avenue 187 feet, south on Congress street 361 feet, and west on Wabash avenue 161 feet. (R. 231.) The ground leases were five in number, all substantially alike in their pertinent provisions.

The land was vacant, and the lessee acquired the right to use it for any lawful purpose not prohibited by the leases, each of which merely required the lessee to erect and maintain upon the premises a substantial fireproof building of a stated minimum cost. It was commercial property near the business center of a great industrial city already conspicuous for its phenomenal growth. The lessors knew that the building then contemplated by the lessee was to be a combined hotel, office and auditorium building; and such a building was actually erected in accordance with the plans and methods then regarded as suitable for the purpose. Its size and character made the architect's problem exceedingly difficult and he did not solve it successfully. Modern steel skeleton construction was just beginning to struggle into recognition as the only sound solution of such a problem, and it was not applied to this building, which was structurally defective from the start, and is now a demonstrated failure. But the lessors say that the building, however unprofitable and structurally defective, must be maintained on the premises for over a century and a half to come unless the lessee will pay rentals largely in excess of those reserved in the leases, or will buy out the fee on the lessors' terms.

Two of the leases were from Wirt D. Walker of the land now owned by the Willing defendants, one from Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck of the land now owned by the Sears-Slater defendants, and two from the Studebaker Brothers Manufacturing Company of the lots now owned by the Chapin trustees, who are taking no active part in this litigation. All of the leases were dated early in 1887, and ran for 99 years from August 1, 1886 to August 1, 1985. The two Walker leases (R. 199, 200) named $420,000 as the value of the land, five per cent of which, or $21,000 per

annum was reserved as ground rent for the first twenty years of the term expiring August 1, 1906. The agreed valuation in the Peck lease (R. 200) was $193,500, and the annual rent for the first twenty years was six per cent thereof, or $11,610. The Studebaker leases (R. 201) reserved a ground rent of $3,600 during the same period. After August 1, 1906, all of the leases called for a ground rent of six per cent on appraised valuations to be made every ten years. In this respect the Studebaker leases stand as originally made, but the Walker and Peck leases have been extended and modified in the manner presently to be stated. The ground values assumed in the Walker and Peck leases were above rather than below actual market values in 1887. (R. 287.) The leases provided that the lessors should, at the end of the term, purchase the "buildings and improvements then on said demised premises" at an appraised value in no case exceeding what if anything they then added to the value of the ground if vacant. (R. 45, 62.)

The granting clause in each lease was an unrestricted grant of the use of the property for the term of the lease. Each of the five leases required the lessee to construct on the demised premises, "a substantial and solid fireproof building of brick, stone, iron, steel and tile, and such other materials as are necessary and usual in fireproof buildings in the City of Chicago," to cost not less than a specified sum, "said building in the character of the materials to be used in its construction to be as follows:

> "All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fire proofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick

> or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part." (R. 542-3.)

The minimum building cost under the first Walker lease was $475,000, under the second Walker lease $275,000, under the Peck lease $400,000, and under each of the Studebaker leases $50,000; making an aggregate required cost of $1,250,000.

On the five parcels of leased ground the plaintiff erected a massive hotel and office building, with a central theatre occupying part of each of the holdings. (R. 231.) It was completed about December 1, 1889 (R. 212) at a cost of over $3,000,000 (R. 273), part of which was defrayed by mortgages of its leasehold interests, and the balance by the subscribers for its $2,000,000 of capital stock. There are now outstanding $834,000 of its first mortgage bonds dated February 1, 1889 and due February 1, 1929 (R. 202, 205), and $541,000 of its second mortgage bonds dated February 1, 1892, and due February 1, 1942. (R. 203, 205.)

Henry J. Willing, of Chicago, acquired the Walker fee March 17, 1890 for $475,000. (R. 199.) Likewise the Peck fee was conveyed February 2, 1889, for $232,000 to Francis A. Bartlett, trustee, of Boston, and William A. Slater, of Norwich, Conn. (R. 200.) In July, 1891, by agreements with the respective purchasers, the Walker and Peck leases were extended for an additional period of one hundred years until August 1, 2085, the revaluation clauses were abrogated, and the ground rent under each lease was fixed for the remainder of the term. (R. 200.) The rent of $21,000 then payable under the Walker (Willing) leases was increased to $28,500 until August 1, 1896, and to $30,000 thereafter (or more

than 42 per cent); the rent of $11,610 under the Peck lease to $14,000 from and after August 1, 1896. The Studebaker leases have not been extended, nor have the revaluation clauses been eliminated therefrom.

There are in all of the leases the ordinary covenants for maintenance and repair and for replacement in case of fire. There are no covenants expressly denying or permitting the substitution of a new "substantial and solid fireproof building" in case it develops that the one first erected does not comply with this description, or has become obsolete in character, financially unprofitable and prospectively unsafe. That such is now its condition, is alleged in the bill and established by the evidence.

Its assessed value for taxation has for some years past been $100,000. (R. 379.) It is in reality a burden on the land and on the leasehold. It furnishes no security for the ground rent. The new, modern, fireproof building which plaintiff proposes to erect immediately will furnish ample security for the ground rent. Plaintiff offers to give adequate security for the completion of the new building and to consent to other equitable terms. The lessors claim that, without their consent, the present worthless building cannot be replaced, and that if such replacement is attempted it will work a forfeiture of the leases. They demand an increase in the ground rental as the price of the removal of the obstacle or cloud which their claims effectively create, and the petitioners say by formal averment in this record that plaintiff has no remedy of any kind in any court—"that no court has any jurisdiction on any theory." (R. 638.) The lessee must proceed at once if it is to save anything of value under these leases. The lessee's equity in the Walker and Peck leaseholds is worth $2,738,000 if they can be properly improved

(R. 287); otherwise it is worth little or nothing. If the plaintiff is permitted to erect this new building, it cannot hope even then to realize the principal of its investment out of the value of its leaseholds under the present ground rentals, to say nothing of the loss of all dividends, except one of 1½ per cent, during the past forty years.

Judge Wilkerson, in his opinion in the District Court, gives a summary of what he styles "*the facts averred in the pleadings and established by the evidence,*" and as these facts are not disputed we respectfully refer to his recital on pages 545 to 548 of the printed record, from which, however, we quote the following passage, with confirmatory references to the record:

> "Because of fundamental defects in the construction of the building, it will continue to deteriorate and there is reasonable ground to believe that it will become unsafe. (R. 327.) It is impossible for engineers to make a definite forecast as to how many years will elapse before that stage is reached. (R. 366.) When that stage of deterioration shall have been reached it will not be possible to make the building safe and conformable to the municipal regulations except at a cost so great that the earnings from the building as reconstructed would not represent an adequate return upon the investment. (R. 323.) By reason of the fact that the masonry bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas do not afford adequate light for hotel and office purposes (R. 286); the finishing is old fashioned and out of date (R. 351); the elevators are inefficient and inadequate (R. 355); the plumbing, drainage and water supply systems are inadequate, antiquated and unsound (R. 354); the heating and wiring systems are inefficient. (R. 353.) In short, the building has passed into the class of old buildings which are being torn down in the central dis-

trict of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected. (R. 372.) The highest and best use of the property covered by the leases in suit, at the present time and for many years to come, is one involving the construction of a new building of greatly increased height and capacity. (R. 289). Any building adequate to these requirements would necessarily be a modern steel-skeleton structure carried to the maximum height now permitted by law and supported on caisson foundations. (R. 286.) The cost of such a building would be between ten and fifteen million dollars. (R. 236.) Plaintiff desires and proposes to remove from the Auditorium property the present building and to erect in its place an adequate, modern steel construction building at a cost of not less than ten million dollars, adapted for a hotel, auditorium and safety deposit vaults. (R. 236.) Plaintiff has under consideration plans for such a building (R. 236); and has assurances from financial institutions, that if its right under its leases to remove the old building and erect the new one can be established, the necessary funds can be procured." (R. 237-240.)

The bill of complaint, after setting out these facts in substance, and the desire and ability of the plaintiff to improve the property with an adequate building, avers (R. 28), that the defendants, or some of them, claim that the present building cannot be removed, even for the purposes of reconstruction and upon adequate security, without violation and forfeiture of the leases; that persons with whom plaintiff must deal in financing its proposed enterprise are fearful lest its prosecution would work such forfeiture; that these claims, fears and uncertainties have clouded the plaintiff's title to its leasehold estates and impaired their value and made them unmarketable; that plaintiff has no adequate remedy at law; and that said defendants have refused to consent to the replacement of the building by the proposed im-

provement, or to forego the claims which cloud plaintiff's title, unless plaintiff would agree to pay them large sums of money in excess of what the leases call for.

The bill of complaint prays specifically (R. 31) that the court will remove said claims and clouds from the leasehold estates and quiet and establish the title thereto with full right and power to tear down the building and erect a more valuable one on the premises upon giving such security as the court may direct, and will enjoin the defendants interested in the fee from asserting any forfeiture by reason thereof and from taking any steps to prevent removal of the building for the purposes aforesaid. (R. 32.) There follows a general prayer for equitable relief.

The active defendants, in their answers to the bill, reiterated their claim and assertion that any attempt of the plaintiff to wreck the present building with a view to reconstruction would have the effect of forfeiting the leases. (R. 169, 182, 183.)

The view of the District Court was that no matter how clear the rights of the lessee might be, or how inadequate its remedy at law, it has at all events no remedy in equity; and the meaning of the defendants' argument and of the District Judge's opinion is that plaintiff must maintain an obsolete, unprofitable and prospectively unsafe building in the heart of Chicago for a hundred and fifty years to come, without remedy of any sort, either at law or in equity.

ARGUMENT.

I.

EQUITABLE JURISDICTION OF THE COURT.

Plaintiff cannot begin even the preliminary financing of its $10,000,000 building enterprise until the doubts by which its right to rebuild is now clouded shall have been removed. The defendants do not like the characterization of those doubts as a cloud on title, but they cannot deny that those doubts do in fact deprive the plaintiff of the beneficial use of its property, and would in fact be dispelled by an appropriate decree of a court of equity. The burden is on them to show how or why equity is disabled from exercising its remedial powers in a case where its intervention is so sorely needed and would be efficacious. Our contention is and always has been that *when there is a legal right to the beneficial use of property, when obstacles prevent the present enjoyment of that right, when the decree of a court of equity would in fact remove those obstacles without violation of rights of private individuals or of any principles of public policy, and when the courts of law afford no adequate remedy, the jurisdiction of equity is complete.*

The main arguments against the jurisdiction of equity put forward by counsel or adopted by the District Court seem to us reducible to the following propositions:

1. That the bill of complaint lacks some essential feature of a bill to remove cloud on title, and that, unless definable as such, it does not fit into any one of the forms

of equitable action which comprehend and exhaust the remedial powers of equity.

2. That the lessors merely insisted on what they believed or claimed to be their legal rights, and that equity is powerless to intervene except for the redress of legal wrongs.

3. That the bill merely seeks a declaration respecting future rights not involved in any present controversy of which a court can take cognizance.

From all of which, the practical conclusion is drawn that plaintiff, though possessed of the legal right to the present beneficial use of its property, must forego the exercise of that right for a period extending as far into the future as this republic has existed in the past. The only alternative conceded is that plaintiff may begin to tear down the Auditorium Building and defend any action brought against it; this in face of the fact that even that first step could not be taken until the refinancing arrangements, which are impossible without a decree, had been made, nor until the building had been emptied of tenants and plaintiff's only sources of revenue had been thereby stopped for an indefinite period, and then only at the risk of losing its entire leasehold estate if the legal advice upon which it acted should prove to be mistaken.

What Is a Legal Right?

It is agreed that equity cannot act in this case except in aid of some legal right, but the conception of a legal right urged by adversary counsel and adopted by the District Judge seems to us to be the origin of a whole train of fallacies. This conception appears in the forefront of Judge Wilkerson's opinion:

"It is of course elementary that the court is with-

> out power to construe these leases unless there is presented a case in which are involved rights of persons or property which are actually controverted in the particular case before the court. * * * The plaintiff must ask that the defendant be decreed to do something." (R. 551.)

There may be special departments of equity in which that proposition is elementary; certainly it is not elementary in the exercise of equitable jurisdiction as such. The rights claimed by plaintiff are obviously in fact denied and resisted in this particular case, but in any event the doctrine that a right is not cognizable by courts of justice unless controverted, if possessed of general validity for any purpose, pertains to the canons of the common law rather than to equity. Trustees are constantly applying to the court for instructions, not because the defendants disagree with them about the performance of their duties, but to protect themselves against the possibility of any such claim at some future time. In suits to establish title, or to remove clouds on title, equity regularly intervenes to protect the rights of a plaintiff about which no controversy exists. The owner of a title acquired by adverse possession, the evidence of which is not a matter of record and might be lost, is entitled to a decree establishing his title as against the holder of the patent title, even though such holder may have entirely abandoned the property. The jurisdiction does not depend at all on any adverse claim by the defendant. As was said by this court in a leading case on the subject:

> "The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. * * * As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title

> with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment."
>
> *Sharon* v. *Tucker,* 144 U. S. 533.

The right does not depend on its being controverted, and the relief accorded need not consist in ordering anybody to do anything. The whole theory of parties in equity is inconsistent with the proposition which we are trying to refute. In an ordinary foreclosure suit, parties are joined as defendants on the mere allegation that they have or claim some junior interest in the property. Such a defendant may file a disclaimer, but he cannot sustain a demurrer to the bill on the ground that it fails to show any assertion on his part of an adverse claim. The apprehension that he might make a claim, and the right of the plaintiff to the enjoyment of the property free and clear from any possibility of such claim, is all that is needed to enable the court to enter a decree against him.

The District Judge returns to this subject near the end of his opinion, where in slightly different form he restates his view thus:

> "Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. * * * Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity." (R. 562.)

The underlying conception is that a right is not cognizable by a court of equity without proof of a corresponding wrong. While the present case does in fact disclose such a wrong, consisting of unfounded asser-

tions made before suit was begun and reiterated in pleading and by argument during its progress, we do not believe that equitable jurisdiction is conditioned by the assertion or existence of any such wrong. The ownership of property includes a right to its beneficial use; that right is coeval with the ownership and does not come into being for the first time when somebody disputes it; and it is one of the ordinary and most useful functions of equity to render such a right available by the removal of obstacles to its enjoyment. The utmost that can be required is that there must be in fact a real obstacle to the free enjoyment of the right.

In *Gavin* v. *Curtin*, 171 Ill. 640, sustaining the power of equity to sell land on petition of a life tenant in order to prevent its loss and sacrifice, the court said:

> "The record discloses the defendant in error is possessed of a right, recognized by the general principles of municipal law, to enjoy during her lifetime an estate in the premises involved in the proceeding, and that her children, if any are born to her, will be legally entitled to receive and possess in fee the remainder in said property. * * * The right possessed by the defendant in error in this case is one which belongs to the purview of municipal law and comes within the scope of juridical action."

In *Fulwiler* v. *McClun*, 285 Ill. 174, the court disregarded its long-established rule against entertaining bills for the determination of legal titles, and removed as a cloud on title a doubt caused by a clause in the will under which complainant claimed, saying:

> "This was not a bill calling upon a court of equity *merely* to determine and declare a legal title, but it presented a case calling for the exercise of the jurisdiction of the court on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her. The court had juristion." (Our italics.)

Equity does not exist merely to compose quarrels. The enjoyment of the beneficial use of property is one of the subjects of its ordinary protection, without any rights of persons or property "which are actually controverted in the particular case before the court," and without any prayer that defendant be decreed to do something.

Grounds of Equity Jurisdiction.

The ultimate reason assigned by the District Judge for dismissing the bill, and one of the points heretofore most stressed by counsel, was that "the facts of the case must come within some head of equity jurisprudence." (R. 562.) This is an irreproachable maxim when rightly interpreted, but we think it a grave error to picture equity as a congeries of stereotyped forms of action outside of which its remedial powers cannot operate. The issue thus raised goes to the very foundation of equitable jurisdiction. History brings out in clearer relief than any argument could do the difference between tendencies in modern jurisprudence which accord with the true genius and sound traditions of equity, and those which, merely reflecting the opportunism of the moment, Professor Pomeroy thinks he detects in some of the code states.

Original Writs and Forms of Action.—A Retrospect.

During the Anglo-Saxon era, and probably for some years after the Conquest, ordinary courts of justice for the common people were composed of freeholders selected for the occasion, and a plaintiff commenced his suit when and as he pleased, stating his case in his own way without being tied to forms. The king reserved power to temper the rigors of the law in any particular

case through the exercise of the royal prerogative, often guided by the advice of his chancellor, who had custody of the king's seal. Persons of rank resorted to a different tribunal, known as the Curia Regis, which gradually drew to itself jurisdiction of all matters of importance, so that suitors to whom the old county or hundred courts had once been open freely and without formality were now obliged to resort to the king's court, and could do so only by special authority of the king's writ, issued in conformity with the strict practice of that court, which included the payment of a substantial fee. All writs out of the king's chancery commanded the sheriff of the proper county to summon the defendant to appear at a day certain, and each followed one of a limited number of forms, of which a complete register was kept in the office of the chancery. Where no writ existed, no action would lie. Justice in the common law courts was thus in many cases the slave of form.

1 Spence, Equitable Jurisdiction 62, 108, 226.

> "That an early stage in the history of law is marked by the greater relative importance of adjective law, and that, consequently, this department of the law is the first to become systematized, is a commonplace of legal history."
>
> 2 Holdsworth's History of English Law, (3d ed.) 244.

The tyranny of rigid forms did not grow up until after the conquest. Speaking of the reign of Henry II, Professor Holdsworth says:

> "It is not probable that an official register of writs was in existence at this early period. * * * The court is not fettered by precedents. It is both able and willing to act upon principles of equity that right may be done. It is clear, however, that

> we have attained one of the leading characteristics of English law. It consists of a number of distinct causes of action, each begun by its appropriate writ."
>
> 2 Holdsworth, 194.

The tendency of fixed forms to shackle the administration of justice was not peculiar to English law, but is to be found in all developed systems. Professor Samuel Williston, in a note in his edition of Stephen on Pleading, after a learned discussion of the evidence touching the origin of writs, says:

> "To attempt to trace them further may appear superfluous, yet it may be observed that one of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate formula of complaint or claim. * * * Whatever the object, it is certain that such was the practice of ancient Rome, and that, from a period almost as early as the introduction of the laws of the twelve tables; and so severely were these formulae observed, that any deviation from them was fatal to the cause."

The primacy of form over substance, from which all developing peoples have found it so hard to emancipate themselves, attained its maximum in early England.

> "The history of civilized jurisprudence can show nothing of the same kind comparable with the blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the stubborn resistance which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established."
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> 1 Pomeroy's Equity Jurisprudence, (4th ed.) Sec. 16.

As the original writs congealed in fixed forms, the king's chancery endeavored to temper their rigidity,

thus exciting the jealousy of the commons and leading to some relief from Parliament. By the statute of Westminster it was provided that where a writ for one case was found, and none for a similar case, a writ for the latter might be framed by the chancery *in consimili casu cadente sub eodem jure*, but the discretion thus conferred was extremely limited.

> "The common law had, as we have seen, grown up round the royal writs. They formed the ground plan upon which the builders of the common law worked; and it was for this reason that the learning of writs was the first thing taught to students of that law. Seeing that the choice of a wrong or inappropriate writ meant loss of the action, this learning continued to be of the utmost importance to the practitioner all through his career."
>
> 2 Holdsworth, 512.

Sergeant Stephen, in his celebrated treatise, originally published in 1824, dwells on the effect of the narrow common law procedure upon legal remedies even in his own day.

> "An original writ (as already stated) was formerly essential in every case to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are even now considered as within the scope of judicial remedy, in the English law, but those to which some known original writ (when these instruments were in universal use) would have applied, or for which some new original writ, framed on the analogy of those already existing, might, under the provisions of the statute of Westminster 2, have been lawfully devised. The enumeration of writs and that of actions have become in this manner identical."
>
> Stephen on Pleading, p. 8.

First Stage of Emancipation—Legal Fictions.

Every system of law, when it has enmeshed itself in rigid technical forms, endeavors to shake itself loose by various devices, the first of which in historical sequence is the resort to legal fictions. The process is graphically elucidated by Sir Henry Maine in his "Ancient Law," first published in 1861. The passages here quoted are from the handy edition in Everyman's Library, the editor of which says that the treatise "immediately took rank as a classic, and its epoch-making influence may not unfitly be compared to that exercised by Darwin's Origin of Species."

> "A general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted."
>
> Maine, Ancient Law, p. 15.

Lawyers of the present day will perhaps most readily recognize legal fictions in the figures of John Doe and Richard Roe, frequently to be seen in the pages of reports which must still be consulted for precedents. Plaintiff in ejectment perforce alleged a fictitious demise, which the defendant was not permitted to traverse. Such averments were familiar features in Roman law. For certain jurisdictional purposes a foreigner averred that he was a Roman citizen, and the allegation was not traversable. During the period of rivalry between various courts in the British realm such fictions enjoyed considerable vogue. A plaintiff who

wished to sue in the King's Bench or Exchequer instead of the Common Pleas would allege that the defendant was in custody of the king's marshal, or that he himself was the king's debtor and could not pay the debt by reason of the defendant's default, and neither court would suffer its jurisdiction to be defeated by a plea putting in issue the gratuitously false averment.

Maine, Ancient Law, p. 15.

The following passage from the Encyclopaedia Britannica contains a technical exposition of this singular hocus pocus.

"*Capias, latitat* and *quominus* are interesting as showing the extraordinary mass of fictitious allegation in the old procedure of the common law courts before 1832. By *capias ad respondendum* followed by *alias* and *pluries* the court of common pleas was enabled to take cognizance of an action without the actual issue of an original writ. The *capias* was a judicial writ issued to follow an original writ of trespass *quia clausum fregit*. The issue of the original writ and after a time the issue of the *capias* became mere fictions, and proceedings commenced with the issue of another writ called *capias testatum*. On return of the writ the plaintiff elected to proceed with a cause of action other than trespass, and the real merits of the case were eventually reached in this tortuous manner. After being served with the *capias* the defendant was bound to put in common or special bail, the former being sufficient in all but exceptional cases. Here again there was a fiction, for his common bail were John Doe and Richard Roe. The same fictitious pair also appeared on the side of the plaintiff as his pledges for the due prosecution of his action. By *latitat* and *quominus* the courts of King's Bench and Exchequer respectively assumed jurisdiction by a further series of fictions over ordinary civil actions. The writ of *latitat*, following the bill of Middlesex, itself in later times generally a fiction, alleged that the defendant was in hiding out of Middlesex, after committing a trespass *quia clausum fregit*, for

> which he was in the custody of the king's marshal in the Marshalsea prison. The real cause of action was then stated in what was called the *ac etiam* clause. The writ of *quominus* alleged that the plaintiff was the king's debtor, and that through the defendant's default he was unable to discharge the debt."
>
> 28 Encyc. Brit., (11th ed.) 849.

Reduced to intelligible terms, what has happened is this. The law had been that a simple creditor could not sue in the Exchequer; now he can do so, but must insert in his declaration the false averment about his being in debt to the king. The procedure has changed, but there is a taboo on any confession of change; hence superstition saves its face by a protestation known to everybody to be untrue. The psychological processes involved in this expedient are thus commented upon by Sir Henry Maine:

> "It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law."
>
> Maine, Ancient Law, p. 16.

Second Stage of Emancipation.—Equity.

The second of those agencies mentioned in Sir Henry Maine's work by which law is gradually adapted to the needs of society is Equity. In primitive days, before technical writs had narrowed the scope of the law, such equitable principles as received recognition at all were applied by the common law courts themselves.

> "The power of the king's justices to modify the

rigor of the law by applying to its interpretation the principles of equity, as distinguished from those of strict law, in certain cases, is expressly recognized by Glanville, and by Bracton; such modifications constituted a part of the *jus praetorium*, which was constructed by the common law judges."

1 Spence Equitable Jurisdiction, 126.

"In Edward I's reign the judges were not prepared to tie their hands too tightly. They were not prepared to abandon completely their claim to administer both law and equity."

2 Holdsworth, 333.

When the common-law judges were unable to meet an emergency, other agencies intervened. The king exercised a kind of equitable jurisdiction for mitigating the rigor of the positive law.

"In each nation, the prerogative appears to have been of imperial origin. Edgar's successors, Anglo-Saxon, Norman and English, continued to exercise this jurisdiction, which is the germ of the jurisdiction of the court of chancery."

1 Spence, 77.

If it had been possible for the chancery to multiply the forms of writs, the procedure might have been expanded to meet the growth and needs of the nation, but no such power existed.

"Although the chancery clerks decided in the first place upon the form and kind of writ in every case, and thus determined the species of action to be brought, this decision did not in the least protect or secure the plaintiff after he had commenced his action. When the action came before the common-law courts, the judges assumed and constantly exercised the power of determining the sufficiency of the writ; and if they held that it was not the proper one for the case, or that its recitals of facts or formulas were imperfect or mistaken, no attention was given to the prior decision of the chancery of-

ficials, the writ and action were dismissed, and the plaintiff thrown out of court."

1 Pomeroy, Sec. 21.

"Ultimately a distinct tribunal for supplying the deficiencies of the common law, and for correcting the rigorous operation of its rules and maxims in particular cases, established itself."

1 Spence, 127.

This was the court of chancery, which, as a separate tribunal, seems to have emerged near the close of the thirteenth century. During the reign of Edward II it was in full operation, and it became of great importance as a court of ordinary jurisdiction in the reign of Edward III, when it appears as a distinct court for giving relief in cases which required extraordinary remedies. This sovereign, about the middle of the fourteenth century, promulgated an ordinance referring to the chancellor, as keeper of the privy seal, all such cases as were "of grace." The jurisdiction thus conferred, unlike that of the common-law courts, was not restricted by conventional forms.

"From this time suits by petition or bill, without any preliminary writ, became a common course of procedure before the chancellor, as it had been in the council. On the petition or bill being presented, if the case called for extraordinary interference, a writ was issued by the command of the chancellor, but in the name of the king, by which the party complained against was summoned to appear before the court of chancery to answer the complaint, and abide by the order of the court."

1 Spence, 338.

It was about this time that the court of chancery ceased to attend the king and found a fixed abiding place at Westminster. Mr. Spence thinks that equitable doctrines would have perished if they had not been kept

alive in a separate court of chancery where procedure was not limited by any rigid forms.

> "Had not the clerical chancellors resisted with effect the introduction of the common-law system of pleading, much of the utility of the court would have been destroyed; this is one of the many advantages that resulted from the court having been founded by persons who took for their guide the principles of general jurisprudence, and looked only to the attainment of what they considered to be substantial justice."
>
> 1 Spence, 376.

Equity, however, did not escape the common tendency of all forms of creative energy to harden into mechanical processes and static institutions. Jurisdiction was declined in the present case by the District Court because "the facts of the case must come within some head of equity jurisprudence." (R. 562.) As an abstract proposition the statement is irreproachable, perhaps axiomatic; everything hinges on its application. While we expect to show in due place that the present suit would fit into any system of equitable forms of action, however hard and fast, if such system did in fact exist, we do not believe that equitable remedies have lost their saving virtue and settled into fixed moulds outside of which equity can afford no redress.

No one has done more to dispel such aspersions upon the powers of equity than the eminent jurist who, in view of a tendency which he detected in the code states to deny any peculiar virtue to equitable principles, has subjected them to a more exact analysis. He writes in his preface:

> "I need not dwell upon the disastrous consequences of the tendency above described if it should go on to its final stage. Even a partial loss of equity would be a fatal injury to the jurisprudence of a state. So far as equitable rules differ from those

> of the law they are confessedly more just and righteous, and their disappearance would be a long step backward in the progress of civilization."
>
> 1 Pomeroy, Equity Jurisprudence, p. xiii.

It was in the hope of helping the legal profession to preserve the salutary doctrines of equity from loss or diminution, that Professor Pomeroy undertook the critical examination of its underlying principles, which is the distinguishing feature of his monumental work.

Mr. Pomeroy's Analysis of Equity.

Counsel for the petitioners still call upon us (Brief, p. 31) "to classify the bill under any established principle"; not, however, they say "simply in order to affix a label or provide a caption," but in order that we may point out "what known principles of equity jurisprudence, if any, are applicable to enable a federal court of chancery to grant relief." While we fail, in the light of the succeeding arguments of the brief, to see any difference between what counsel disclaim and what they demand, we think some not infrequent misconceptions on the subject would be dispelled from their minds if they would follow Mr. Pomeroy's guidance. Support has been sought by them in certain passages of his work, especially one in which he says:

> "A court of equity will not, unless perhaps in some very exceptional case, assume jurisdiction over a controversy the facts of which do not bring it within some *general principle or acknowledged head* of equity jurisprudence." (Our italics.)
>
> 1 Pomeroy, Equity Jurisprudence (4th Ed.), Sec. 62.

In his preliminary chapter, in which this and similar language is used, the author has not yet embarked upon his analysis of modern equitable remedies, but is dis-

coursing of the genesis of what he calls *equitable primary rights.* What he means and says is that the creation of *these* has ceased, and that courts of equity no longer assume to enforce principles which appeal to their moral sense alone and have not won a place in established jurisprudence. The equity of redemption, the law of uses and trusts, the separate property of married women are equitable primary rights having no counterpart in the common law at all. The early chancellors, generally ecclesiastics countenanced by the king and at odds with the common law judges, were successful in enforcing recognition of many principles of this character, which have nothing to do with the law of remedies. With respect to them, there could be no question of the adequacy of legal remedies, because the rights themselves were wholly unknown to the law. Equity consists of two parts, new primary rights having no existence in common law, and remedies unknown to the common law for rights already recognized as justiciable. It is the primary rights unknown to the common law which Mr. Pomeroy, as shown by the authorities he cites, had in mind in the following passage, which was pressed against us in the courts below (Sec. 62):

> "Although the jurisdiction of chancery was originally based in great measure upon the omissions of the common law, the injustice of many of its rules, and its inability, from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice, yet since the equitable system has become fully established, and its principles settled, this *origin* of the jurisdiction is no longer regarded as furnishing the *real* criterion. The whole question by which the extent of the equity jurisdiction is *practically* determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate,—although the latter inquiry is still sometimes made and treated as though it were control-

> ling,— the question is, rather, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity." (Italics Mr. Pomeroy's.)

In other words, there must, at the present day, be a primary right, either legal or equitable, having a place in established jurisprudence, before equity can be invoked. A chancellor in the days of Edward the Third may have been able to create the equity of redemption as against a mortgagee whose title was absolute at law, or to enforce the recognition of uses and trusts out of good conscience, but a chancellor of the present day, however just he may deem it to protect an individual in his "right of privacy," or the public against the billboard advertising nuisance, does not feel at liberty to do so unless he can find a precedent in the now established body of equitable primary rights, or until the altered standards of a developing society necessitate innovation. With respect to these the *arbitrium boni viri* is no longer the accepted criterion, but rather the gradually formed body of principles and precedents upon which courts of equity have come to depend.

> "This accumulation became the storehouse whence the chancellors obtained the material for their decisions, and both guided and restrained their judicial action. When this time arrived, all assumption that the chancellor was to be governed by his own standard and conception of natural justice disappeared from the court of equity, and individual conscience was no longer the motive power in that tribunal." (Sec. 49.)

The main fallacy, however, which Mr. Pomeroy labors to dispel is the tendency among code lawyers to see in equity nothing more radical or important than a body of supplemental remedies.

> "No theory is scientifically complete, nor prac-

tically efficient, which does not recognize two distinct sources and objects of the equity jurisdiction, namely, the primary rights, estates, and interests which equity jurisprudence creates and protects, and the remedies which it confers. These two facts in combination can alone define the extent and fix the limits of the equity jurisdiction." (Sec. 133.)

One part of equity consists of primary rights wholly outside the purview of the common law. These are no longer evoked at the caprice of individual judges, and where they are involved no question can arise about the adequacy of legal remedies, because there are and in the nature of the case can be no such remedies. Another part of equity consists of remedies for the enforcement of legal rights. These remedies are devised by equity when and as needed, they are available whenever the remedy at law is inadequate, and they are not limited by any roster of fixed forms.

"The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use. * * * Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." (Sec. 109.)

Application of Mr. Pomeroy's Analysis.

The right which plaintiff in the case at bar asks equity to vindicate and make effective is not some strange primary right to be evoked by the chancellor out of his unfettered conscience, but is the lawful right of a lessee of vacant land to use it for any purpose not specifically

prohibited by the terms of the lease. Yet the petitioners still object, in the very caption of page 30 of their brief, that "the case set up by the respondent is not embraced within *any principle or head of equity jurisprudence.*" No such question can arise until a chancellor is asked to evoke out of the depths of his conscience a *primary right* which had no previous existence. Whenever the doctrine of "heads of equity jurisprudence" has been invoked as a supposed rule of decision, it will be found that the real trouble with the case was the absence of any primary right at all and not the inability of equity to protect or maintain such right if it really exists. The demonstration of this statement may appropriately begin with the following extract from Judge Wilkerson's opinion in the present case in the District Court (R. 561-2):

> "It is true that the absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties. But while this is true, yet the facts of the case must come *within some head of equity jurisprudence.* When a person brings an equitable action, he must maintain it upon some equitable ground. The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Before the rule as to inadequacy of remedy at law is applied, *some wrong must be shown* for which the plaintiff is entitled to redress. In other words, there must be a cause of action, whether resort is had to one forum or the other. A court of equity, by avowing that there is a right, but no remedy known to the law, *cannot create a right,* in violation of the principles of both law and equity. Before there is a remedy, either at law or in equity, there must be a wrong cognizable in courts of justice under the established principles of law or equity." (Italics ours.)

With due respect, we think the learned judge here set out to demonstrate the necessity of finding some conventional form of equitable action into which the plaintiff's case would fit, but that the argument glided insensibly, as the contention always must, into the mere assertion that there must be a right before equity can afford a remedy. If that were what he really had in mind, nobody would dissent from his conclusion.

The cases cited by Mr. Pomeroy himself in support of the passage quoted above from Section 62 of his work show that this was what he at least meant. His principal citation is the Vanderbilt case, in which application was made to a court of equity to cancel a false birth certificate. The vice chancellor, quoting the above passage from Pomeroy, dismissed the bill on the ground that it fell under "no recognized head of equity jurisdiction," adding that the plaintiff's remedy *"is either at law or else it does not exist."*

Vanderbilt v. *Mitchell*, 71 N. J. Eq. 632, 63 Atl. 1107.

Judgment, however, was reversed by the Court of Error and Appeals in an extended opinion from which the following are excerpts:

> "The absence of precedents or novelty in incident presents no obstacles to the exercise of the jurisdiction of a court of equity. The case presented is novel in incident, but not in principle; but it is no objection to the exercise of jurisdiction that in the ever-changing phases of social relations a new case is presented and new features of wrong are involved. * * * From time immemorial it has been the rule not to grant equitable relief where a party praying for it had an adequate remedy at law; but modern ideas of what are adequate remedies are changing and expanding. * * * Upon the whole case, we are of the opinion that the court of chancery has jurisdiction to afford the complainant ample and

complete relief, as already indicated in this opinion; that *should the court of chancery refuse relief under the circumstances stated in the bill it would cease to be a court of equity governed by principles of natural justice,* especially where property rights may be said to be threatened and personal rights are clearly invaded." (Our italics.)

Vanderbilt v. *Mitchell,* 72 N. J. Eq. 910, 67 Atl. 97.

Lord Justice Lindley, in the course of his opinion in *Holmes* v. *Millage* (1893), Q. B. 551, said:

"It is an old mistake to suppose that because there is no effectual remedy at law there must be one in equity. But the mistake, though old and often pointed out, is sometimes inadvertently made even now. Courts of equity proceeded upon well known principles capable of great expansion; but the principles themselves must not be lost sight of."

The case was one in which the creditor of a nonresident newspaper correspondent sought to impound his future earnings by the appointment of a receiver. Relief was denied, not because of failure of the bill to comply with any procedural formula, but because the creditor had no right to his debtor's unearned salary.

The case of *Roberson* v. *Rochester Folding Box Co.* 171 N. Y. 538, 64 N. E. 442, grew out of the circulation by the proprietors of a flour mill of lithographs bearing the likeness of a young girl, who filed a bill for injunction claiming that she had been greatly humiliated by the scoffs and jeers of persons who recognized her portrait on the advertisement, and had been made ill and compelled to employ a physician because of these facts. In an elaborate opinion, from which three judges dissented, the Court of Appeals denied the existence of the alleged "right of privacy" upon which the bill was predicated; but the only question involved in either the majority or the minority opinion is about the existence of

the right of privacy, and not about the power of equity to protect it if it did exist.

Counsel now quote in their brief (p. 31) the following statement as made by this court in *New Jersey* v. *Sargent,* 269 U. S. 328:

> "It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief."

That language does, undoubtedly, appear in the opinion, but only as having been quoted with approval in *Georgia* v. *Stanton* from the previous case of *Cherokee Nation* v. *Georgia.* However, the statement is a self-evident proposition, and is in substance reasserted later in the opinion itself. The case was an original bill brought in this court by the State of New Jersey involving the right of the judiciary to invade the political department of government, and the bill was dismissed because no such right existed and because, as explained in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, it merely sought an abstract judicial decision where no rights of the plaintiff were shown to be affected either presently or prospectively.

Rees v. *Watertown,* 19 Wall. 107, is a case cited at various stages of this litigation, involving the efforts of a citizen of Illinois to collect a judgment against the City of Watertown, Wisconsin, on its defaulted bonds. As often as he got out a mandamus the aldermen resigned. Then he filed a bill to have his judgment made a lien upon the taxable property of the city. But the suit failed because the alleged right to a lien did not exist. The judgment creditor had a right against the city, but no right to a lien on the property of its citizens. The trouble with the case was much the same as that of the creditor in *Holmes* v. *Millage,* (1893).

Q. B. 551 above cited, who had a valid claim against the debtor but no right to a lien on his unearned salary.

Vassar College v. *Loose Wiles Biscuit Co.* 197 Fed. 983, furnishes another instance of a bill dismissed because of the absence of any legal right involved. Complainant averred a right similar to the "right of privacy," of which the New York Court of Appeals in the *Roberson* case denied the existence. The college sought to enjoin the defendant from selling and advertising "Vassar Chocolates" in packages adorned with the likeness of a young lady in scholastic garb with a mortarboard hat and other significant badges, but the court dismissed the bill on the ground that "individual conception of natural justice is not law," and because it was beyond the power of the court "to take cognizance of the psychological injuries recited."

We believe enough has been said to show that the idea of a limited number of equitable forms of action outside of which all relief in equity is precluded has no foundation in reason, common sense or law. It may be convenient for ordinary purposes of classification to have at hand a cabinet of standard labels, but our position is that no such catalogue can deprive equity of its fundamental and most valuable attribute of granting to persons who are being deprived of their lawful rights relief according to the exigencies of each case as it arises. There may be decisions in which a court, upon dismissing a bill, has stated, in broader terms than Mr. Pomeroy's view would warrant, that every case for redress in equity must fall under some definite head of equitable jurisdiction, but we do not believe any respectable decision can be found in which relief has been refused on that ground alone to a plaintiff who had a valuable property right of which he was losing the present beneficial use by reason of obstacles which equity, and equity

alone, could remove. The sense in which the phrase "some acknowledged *head* of equity jurisprudence" is used is shown by its constant association, either in the conjunctive or the disjunctive, with the phrase "some established *general principle* of equity." The doctrine of definite forms of action within which equitable relief must fall is not the real major premise in any judicial decision; it is invoked, when invoked at all, to fortify conclusions based on other reasons sufficient in themselves.

THE BILL CONSIDERED AS ONE TO REMOVE CLOUD ON TITLE.

While forms of procedure may be useful in equity as well as at law for purposes of description and classification, the title of the plaintiff to relief in this case is one of substance and not of form; nevertheless, we now proceed to consider whether the present suit can be catalogued, and if so how. If the bill must bear a label already in stock, our view has always been that the suit can best be described as one to remove cloud on title. Definitions, however, are arbitrary, and if anybody is moved to adopt some narrow description of a cloud on title which would exclude the obstacles actually existing in the present case to the plaintiff's enjoyment of the beneficial use of its property, we should be content to have this case designated as a bill *in the nature* of a bill to remove cloud from title; nor do we conceive that our fortunes in this court can be imperiled by the suggestion.

> "The jurisdiction to relieve the holders of real property from vexatious claims to it casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity."
>
> *Holland* v. *Challen,* 110 U. S. 15.

"The jurisdiction in actions to quiet title or remove cloud does not rest in arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion."

32 Cyc. 1308.

"Since the basis of this jurisdiction is to clear the plaintiff's title from claims which render it less merchantable, the question should not be whether a claim fulfills certain technical requirements, but whether it is of a character to frighten away the average purchaser. In other words, if the claim is of sufficient magnitude materially to affect the market value of the plaintiff's property it should be removed or its creation enjoined."

18 Harvard Law Review, 528.

"Whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest, *and he cannot immediately protect or maintain his right fully and completely by proceedings at law,* then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties." (Our italics.)

McArthur v. *Hood Rubber Company,* 221 Mass. 372, 109 N. E. 162.

"It is certainly for the interest of the state that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for, so long as they remain, they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. * * *

> It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. * * * The truth is that the jurisdiction to relieve the holders of real property from vexatious claims to it casting a cloud upon their title, and thus disturbing them in its peaceable use and enjoyment, is inherent in a court of equity."
>
> *Holland* v. *Challen*, 110 U. S. 15.

It has been seriously contended that, no matter how extreme the need or how complete the absence of other remedy, equity cannot remove a cloud unless it is on the fee of real estate, nor unless it involves the construction of a written instrument other than that through which the complainant derives title, nor unless it arises from some document which is apparently valid on its face, nor unless it consists of some matter of record removable only by extrinsic evidence, nor unless the adverse party has asserted his claim otherwise than verbally, nor unless the plaintiff has first established his right in the law courts, nor unless a variety of other conditions precedent exist, for all of which respectable authority can be found in cases where the circumstances warranted resort to the particular rule that was applied therein. Such limitations, each valid in its proper context or at some stage of the development of equitable jurisdiction, cannot in this year of grace deprive a court of chancery of power to relieve this plaintiff, which wishes to proceed immediately to improve its property, from adverse claims which effectually disable it from doing so and against which the law affords no remedy.

ALLEGED EFFECT OF ILLINOIS LAW.

Increasing stress appears to be laid upon the supposed effect of some alleged rule of Illinois law as a limitation on the equitable jurisdiction of the federal District Court. Indeed, the petitioners say in their brief (p. 38): "Our *principal concern* is that the Circuit Court of Appeals decided the question of equity jurisdiction contrary to the land laws of Illinois." (Our italics.) The argument seems to be (1) that the bill would not lie in the state court where it was brought; (2) that this state inhibition controls the action of the federal court; and (3) that petitioners are deprived of the benefit of the state law in being forced by their codefendants into the federal court. It is still insisted, in spite of Judge Wilkerson's view to the contrary (R., 552), that the Supreme Court of Illinois has narrowed the local definition of a cloud on title, and that this restricted definiiton by the state court is a part of the substantive law of the state which must be accepted by the federal courts as a local rule of property. The Illinois decisions do not support the premise of this argument, and if they did, the conclusion would not follow. The authorities only go to the extent of holding that a state statute *enlarging* the jurisdiction to remove cloud on title creates a substantive right which may be enforced in a federal court; they lend no countenance to the claim that state courts or even state legislatures can in any manner narrow the definition of a cloud on title so as to cut down the inherent jurisdiction of the federal courts with respect to the removal thereof. In *McConihay* v. *Wright,* 121 U. S. 201, which was a suit to quiet title, the court said with reference to federal equity jurisdiction:

> "That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United

States in its courts by the constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity; and no change in state legislation giving in like cases a remedy by action at law can of itself curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Act of Congress."

The plaintiff in the case at bar invoked the jurisdiction of the state court in the first instance, and expects to show that it would have been entitled to prevail in that forum. It is not now relying on the state practice, however, but on that of the courts to which the case was removed. It is ready to litigate its rights in any forum where it can secure a hearing.

First, we take up the contention of counsel that the state law is of controlling effect, in support of which four decisions of this court are now cited. There is, however, no color for the claim that if the local courts or legislatures had excluded from their definition of removable clouds anything previously embraced therein, the jurisdiction of the federal court would be affected thereby. The contrary is the law, as shown by *Guffey* v. *Smith*, 237 U. S. 101, first cited in the petitioners' brief. This court did say in that case that the nature of the interest created by an Illinois oil and gas lease was determined by the laws of the state, and further that the local decisions governed the enforcement of such leases by *action at law*. In Illinois, ejectment cannot be maintained on such a lease when the lessee has not yet found any oil or gas, and this

rule would control the procedure in the federal courts, since it relates to remedies on the common law side. (p. 113.) The lease in question, however, gave the lessee an option to cancel it on payment of a nominal consideration. In Illinois, such a lease, though valid, is regarded as lacking in mutuality, and for that reason will not be enforced in equity. What this court actually decided is that the state law respecting remedies, though binding as regards actions at law, cannot narrow or circumscribe the equitable jurisdiction of the federal court, and that a federal court of equity will enforce such a lease regardless of state decisions to the contrary:

> "These decisions, it is insisted, should have been accepted and applied by the circuit court. To this we cannot assent. By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the federal courts, *sitting as courts of equity*, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting." (Our italics.)

The next case cited by petitioners is *Holland* v. *Challen*, 110 U. S. 15, from the opinion in which we have already quoted important passages, and which sustains the power of federal courts to administer this salutary jurisdiction with all remedies accorded by the state to litigants in its own courts; the exception indicated in other cases being that the state cannot, by its own legislation or decisions, deprive a defendant in possession of the property of his right in the federal courts to a jury trial when sued by a plaintiff out of possession.

Clark v. *Smith*, 13 Pet. 195, in which this court said that a state legislature has power to declare what shall be a cloud on title, was another case holding that an *extension* of the equitable remedy accorded by state legislature is available in a federal court.

The other case cited by petitioners on this proposition is *Pusey* v. *Hanssen,* 261 U. S. 491, where, as stated in the brief (p. 20), "the court was considering the availability of equitable remedies in federal courts as affected by local law." A certain statutory remedy relating to receiverships was held to be a matter of state procedure and not of substantive law, and hence not available in the federal court. In the opinion reference is made by way of illustration to statutes declaring something a cloud on title which theretofore was not, and to the recognized power of the federal court to administer such enlarged remedies as a part of the substantive law of the state. It would be a vastly different matter if a state should undertake to abrogate altogether the equitable jurisdiction of clouds on title, and if thereby, or by vritue of even less restrictive legislation, it were to be claimed that federal courts of equity were deprived of the inherent jurisdiction exercised by the English High Court of Chancery. These views were accepted by Judge Wilkerson in his opinion in the present case (R. 552), as against the adverse arguments then as now urged by counsel for the defendants.

Notwithstanding the view of the law as thus expounded we proceed to answer the contentions of counsel (Brief, pp. 21-27) about the treatment of clouds on title in the Illinois state courts. The Supreme Court of Illinois has been no less explicit than the highest tribunals of other states in declaring what was not, in particular cases before them, sufficient to sustain a bill as one to remove cloud on title. But it is one thing to say that an impediment of some particular sort is not one which, standing alone, equity will assume jurisdiction to remove, and quite another to say that equity cannot remove it as a part of the relief to which a suitor is justly en-

titled. With this distinction kept in view, we think it easy to show that the remedy sought in the present suit would have been accorded by the Illinois courts.

The Supreme Court of that state has frequently said that equity will not take jurisdiction *merely* to remove verbal claims or oral assertions of ownership as clouds on title, or *merely* to declare and determine legal titles.

Parker v. *Shannon,* 121 Ill. 452.
Seeley v. *Baldwin,* 185 Ill. 211.
Greenough v. *Greenough,* 284 Ill. 416.

Prior to 1911, Section 50 of the Illinois Chancery Act conferred express authority on courts of equity to hear and determine bills to quiet title and remove clouds from the title to real estate, whether occupied or unoccupied. The amendment of 1911 extended the jurisdiction of equity to the construction of wills even when no trust was involved, and to bills to establish and confirm titles to real estate. By this amendment the legislature probably thought it was abrogating the strict rule previously laid down by the Illinois court in such cases as *Harrison* v. *Owsley,* 172 Ill. 629, but if so, the legislative intention was frustrated by the courts, which still continued to apply to the statutory proceeding most of the strict rules already announced with respect to the removal of clouds on title. This result was achieved by the odd device of holding that a bill to construe a will, though expressly authorized by the legislature in all cases, would not be entertained unless the construction of the will was really doubtful. Thus, in the case of *Buckner* v. *Carr,* 302 Ill. 378, the court, after determining in a discussion of several pages the true construction of a will, decided that there was no such doubt about its meaning as to give the chancery court jurisdiction to construe it at all. This doctrine is more curious than im-

portant for our present purpose, which is to show that abstract rules promulgated as limitations on the jurisdiction of equity are no more applied by the Illinois Supreme Court than by other tribunals when a concrete situation discloses real ground for equitable relief. *McCarty* v. *McCarty*, 275 Ill. 573, rightly referred to in the brief (p. 21) as a leading Illinois decision, laid down the general doctrine of these decisions in broad outline, and is commented upon in a subsequent case as follows:

> "We held in the case of *McCarty* v. *McCarty*, 275 Ill. 573, that it was error for a court of equity to assume jurisdiction of a bill to construe a will which was neither ambiguous nor uncertain, where there was no equitable estate to be protected or equitable right to be enforced, *and no necessity for the exercise of any power of the court for the conservation, preservation, protection or betterment of the estate, or the settlement of any real controversy between the parties,* but where the bill was filed only for the purpose of obtaining a decree that contingent remainders had been destroyed and that the complainant had a legal title to the premises in fee simple. This is just such a case. There is no part of the will which is doubtful or requires construction." (Italics ours.)
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> *Warren* v. *Warren*, 279 Ill. 217.

The significant comment on this line of decision is twofold: first, that the court, in laying down the rule, usually inserts the qualification that cases involving special equities will be excepted from its application; and second, that when such an exceptional case does arise the court in fact declines to apply the rule.

What the court really meant, and what it actually would do in such a contingency, is clearly shown in the significant case of *Fulwiler* v. *McClun*, 285 Ill. 174, decisive so far as the law of Illinois is concerned, in which

the facts are thus stated by the Supreme Court in its opinion:

> "The bill alleged that the premises consisted of a city lot and two brick dwelling houses which had fallen into decay; that one house was badly out of repair and did not bring sufficient revenue to pay taxes and assessments, and the other was incapable of being rented on account of its condition and was a nuisance; that the complainant had spent many thousands of dollars to keep the dwellings in repair and had exhausted her funds in so doing; that on account of the attempted limitation over to Elisha H., Robert and Edward McClun, her title was clouded and she was unable to borrow any money on the premises and had no other funds; and that the property would not produce income without the expediture of several thousand dollars, although it adjoined the business district of the city of Bloomington. The bill asked for a construction of the will and that the title of the complainant to the premises be determined and quieted. The court sustained a demurrer to the bill, and the complainant having elected to stand by the bill, it was dismissed at her cost."

The decision was reversed, and the bill sustained for the following reasons:

> "This was not a bill calling upon a court of equity merely to determine and declare a legal title, but *it presented a case calling for the exercise of jurisdiction by the court on account of the situation of the property and its existing condition, to enable the complainant to have the beneficial use of the property devised to her.* The court had jurisdiction, and the doctrine of *McCarty* v. *McCarty*, 275 Ill. 573, did not apply to the case." (Our italics)

This decision has never been called in question, and if the present case had remained in the Circuit Court of Cook County, we thing it would be conclusive upon the jurisdictional phases of the present controversy, embodying as it does all the substance of the doctrines for which we contend. True, the bill asked for the con-

struction of a will; but the decision of the court, as shown by the language above italicized, did not base its affirmance of equitable jurisdiction upon that ground.

What we are concerned with is the logic of the Illinois Supreme Court when it differentiated *Fulwiler* v. *McClun* from those cases in which, after protracted discussion of the terms of the wills involved, the court announced that there was no question of construction sufficiently doubtful to bring the case within the operation of the 1911 amendment; that the bill must therefore be justified if at all under the original chancery jurisdiction; and that the suit must be dismissed as seeking merely a declaration of legal titles. Mrs. Fulwiler claimed legal title under the construction which she placed on her grandmother's will, and there is no suggestion that its construction was any more doubtful than that of the wills involved in the other cases.

Jurisdiction Not Defeated Because of Element Which Would Not Alone Support it.

Equity is not prevented from assuming jurisdiction of a meritorious case merely because it involves features which, when isolated, have been pronounced insufficient in themselves to warrant the exercise of jurisdiction.

Equity will not enjoin a criminal prosecution. But it is no less clearly established that in a proper case for equitable cognizance jurisdiction will not be refused because of the fact that its exercise involves an injunction against a prosecution for crime.

Truax v. *Raich*, 239 U. S. 33.
Terrace v. *Thompson*, 263 U. S. 197.
Packard v. *Banton*, 264 U. S. 140.
Hygrade Provision Co. v. *Sherman*, 266 U. S. 497.

The mere illegality of a tax confers no jurisdiction upon equity to enjoin it, since the tax can be paid under protest and an action at law may be maintained to recover it, and hence no irreparable injury results from its collection. But where other equitable grounds exists the rule is no bar to the jurisdiction of the court, as where the tax is or will become a cloud on the title and there is no adequate remedy at law.

Ohio Tax Cases, 232 U. S. 576, 587.
Shaffer v. *Carter,* 252 U. S. 37.
Risty v. *Railway Co.* 270 U. S. 378.

Counsel nevertheless still insist (Brief p. 29) that the bill will not lie because it is "simply" to obtain a construction of the lease under which plaintiff claims. The principle we contend for is that equity will act whenever it encounters the conditions which we have pointed out as warranting the exercise of its jurisdiction, and that equity is not rendered impotent to afford relief in a proper case merely because some issue which would not alone confer equity jurisdiction has to be decided. We think Judge Wilkerson misconceived the nature of this proceeding when he said (R. 558-9):

> "Plaintiff's case as a suit to quiet title under the general usages of equity reduces itself to this: whenever a controversy arises between landlord and tenant as to the construction of the provisions of the lease touching the use of the demised premises, the tenant may resort to a court of equity, and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract."

But if there is in the present case a situation demanding equitable relief, and if the court in affording that relief were obliged to determine what is or what is not the legal effect of certain leases, it does not follow that

the same court could be called upon *merely* to construe the leases where the situation did not exist. This difficulty appears to us to be altogether imaginary.

Oral Assertion of Adverse Claim.

Another taboo which is alleged to forbid relief in equity is the rule that a cloud cannot be removed unless it consists in some written instrument requiring extrinsic evidence to show its invalidity, or, in the language of the District Judge, "a bill to quiet title will not lie to dispel mere verbal or oral assertions of ownership or interest." This we contend is one of those artificial distinctions which may be perfectly proper in the cases in which they have been drawn, but which have no application to a concrete case like the one now before the court. That equity has no inherent jurisdiction merely to construe deeds or interpret contracts is a proposition which may be accepted as axiomatic. That mere verbal assertions of an adverse claim are not enough, without further incident, to create a removable cloud, is a proposition generally true. What gives equity jurisdiction to construe deeds or contracts involving only legal titles is an actual emergency in which its aid is indispensable to assure to an owner the beneficial use of his property, and "mere verbal assertions" will not call equity into action unless they relate to a similar situation.

In *Thompson* v. *Emmett Irrigation District,* 227 Fed. 560, a holder of bonds of the district filed a bill alleging that the district disputed the validity of some of them, and that "by reason of such general vague and indefinite charges" a cloud was cast on the validity of all of the bonds, so that their market value was impaired. One ground for sustaining the bill was the enforcement of a

trust, but the opinion makes it clear that the court con sidered the bill sufficient independently as one to remov cloud on title. After discussing a well known New Yor case in which spurious bonds were canceled because the clouded the value of genuine bonds, the opinion pro ceeds:

> "If a court of equity, upon the suit of the cor poration, has jurisdiction, under the circumstance of the case cited, to cancel spurious stock as a clou upon the title of an owner of genuine stock, it seem clear that a court of equity under similar circum stances would have jurisdiction of a suit to deter mine whether illegal bonds have been issued by corporation, and, if so, by a proper decree to re move the cloud cast upon such issue and upon th title of the holders of the legal bonds of the cor poration, and especially must this be so where, as i the present case, the bonds are to mature serially and no bond will mature, or become due and payable until the first day of January, 1922, and until tha date no judgment at law can be obtained on any o the bonds determining their validity."

Another federal case in which, though the jurisdic tional question was not discussed, the court did in fac remove a verbal claim as a cloud on title in *Oman* v *Bedford-Bowling Green Stone Company,* 134 Fed. 64 The stone company owning part of a switch track acros its land filed a bill to quiet its title to the land and rail road tracks thereon, and to restrain the Omans from asserting any interest in the tracks (p. 65). It is clea from the opinion of the district judge that only verba claims and clouds were in question (134 Fed. 453). A decree in accordance with the prayer of the bill is af firmed and the Circuit Court of Appeals says with ref erence to the railway tracks:

> "They became the individual property of the ston company, applicable to whatever use it might pu them. But the Omans claimed the right to use them

as railroad tracks in the transportation of their freight. This was an assertion of an interest, not only in the track material but in the roadbed, of the right to have the tracks kept where they were and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the stone company."

Verbal assertions of ownership were held to be removable as a cloud on title in *Lovell* v. *Marshall,* 162 Minn. 18, 202 N. W. 64. The bill was filed by a bondholders' committee as owner of certain securities in which the defendant Marshall was alleged to claim an interest. The court said:

"It is urged that all the complaint alleges is that Marshall asserts verbally that he is the owner of the securities in question. * * * The term 'cloud' is indefinite. It is hardly possible to formulate an all-embracing definition or to lay down rules which will cover all the cases in which a court of equity may properly come to the aid of the complainant. A threatened act which will necessarily embarrass plaintiff's title may be enjoined, provided the danger is imminent and not merely speculative or potential."

In *Slegel* v. *Herbine,* 148 Pa. St. 236, 23 Atl. 996, a cloud removed by the court depended on the construction of a deed, which plaintiffs alleged to be void by reason of the breach of a condition subsequent therein. In its opinion overruling the usual array of technical objections the court says:

"No doubt there is not in this state, as there is in some others, any special jurisdiction conferred upon the courts of equity by reason of which they may be called upon to declare the construction of a deed or will or other instrument; nor, of course, will the *mere fact* that the proper construction of such is in dispute confer chancery jurisdiction, in the absence of some other recognized basis of equitable intervention. But it will scarcely be pretended that

> where a party has no legal remedy whereby to protect his property against the assertion of an unfounded or expired claim the established equity jurisdiction is ousted by the *mere fact* that incidentally it will be necessary to put a construction upon a written instrument. Such a doctrine would practically amount to a denial of the jurisdiction." (Our italics.)

If, however, the inability of equity to relieve against adverse claims resting in oral assertion thereof is a doctrine which cannot be maintained, we are next met with the contention that no adverse claim was in fact put forward by any assertion, even verbal, of which a court can take cognizance.

Affirmative Assertion of Adverse Claim Shown by This Record.

We have tried to make plain our position, that equity exists not only for the redress of grievances, but for the protection of rights, and that equitable relief is constantly given in cases where the plaintiff's right is not disputed by anybody. But were it otherwise, the present record affords abundant evidence of the assertion of adverse claim. This proceeding was not commenced until the lessors had rejected all overtures for an amicable adjustment of their differences with the lessee, and had explicitly refused to permit the Auditorium Building to be removed for any purpose whatever. The testimony on this point was that of R. Floyd Clinch, who conducted the negotiations as president of the Chicago Auditorium Association, and it was in no manner qualified or contradicted, although Mark Skinner Willing, with whom the final negotiations took place, was present at the trial. (R. 207.)

The first discussion was with the Sears-Slater trustees

who own the Peck fee (R. 241), and who reside in the east. They came to Chicago, and held conferences with Mr. Clinch. Mr. Adams, as counsel for those trustees, disputed the right of the Association to rebuild, which its counsel, Mr. Kales, as positively asserted. (R. 242.) The question was argued back and forth, the possibility of litigation discussed, and a suggestion made by Mr. Clinch about buying in the fee for the purpose of avoiding litigation. (R. 242.) Mr. Clinch said the Association could in no event buy the Peck fee unless it also got the Walker fee, then owned by the Willing estate. It was stated at the last of these interviews that if the parties could not agree there would have to be a friendly suit in equity. The Sears-Slater trustees said they would not give their consent to the plans for tearing down the building and putting up another (R. 263). They said they would not let the Association tear down the building for the purpose of putting up another. (R. 264.)

A few weeks later Mr. Clinch saw Mr. Willing and Mr. Cramer, the trustees representing the owners of the Walker fee. Mr. Willing disagreed with him about the right to rebuild without consent of the lessors (R. 242), and as to selling the fee, he mentioned a price which Mr. Clinch would not consider. Mr. Clinch told him that if they could not come to closer terms the only thing to do would be to bring a friendly suit in equity. Mr. Willing said he guessed that was the only thing that could be done, and expressed his willingness to do all he could to accelerate such a suit and bring it to a speedy conclusion. In the conversation he said he had consulted his attorneys, who told him the Association had no right to tear down the building. (R. 243.) Mr. Willing insisted that if a building was put up from which the Association realized more money it would

have to agree with him and his associates for the payment of a larger rent before taking the building down. (R. 254.) He said that if a suit was brought in equity he would do all he could to hasten a decision and not put any obstructions in the way, but he said he would oppose the construction of the lease placed upon it by the Association. (R. 255.) Of this complacency he and Mr. Cramer apparently repented afterwards when they realized that the most efficacious means of forcing plaintiff to abandon its leases or pay a largely increased rent was to leave it in full possession of all of its troubles, thus driving home to the minds of its officers and stockholders the conviction that there was no refuge from their demands in any court of justice.

It has been insistently argued that the record does not disclose any explicit threats or adverse assertions by these lessors. We do not believe it is necessary to labor that point before this court, which is presumably not ignorant of what everybody else knows. Negotiations in the modern business world are not couched in terms of express defiance like a challenge to a duel. The iron hand is no less potent because concealed in the velvet glove. We are not dealing with a civilization in which a successful litigant expects to be shot by his defeated adversary. The interviews show beyond a shadow of doubt that the lessors declined to permit plaintiff to go forward with any rebuilding plans and made it perfectly clear that any attempt to carry them into effect would be resisted, and it was only in the hope of evading the effect of this ultimatum that plaintiff opened tentative negotiations about the purchase of the fee. Under those circumstances it would be manifestly impossible for it to begin even the preliminary financing of its enterprise.

If any doubt had existed about this feature at the

time the motion to dismiss the bill was argued, such doubt would be dispelled by the answers filed and the defense made in this case.

> "Where the defendant in his answer sets up a claim to the property it is not necessary for the plaintiff to prove the assertion of the claim."
>
> 12 Encyc. of Evidence 608.

In *Brown* v. *Cox*, 158 Ind. 364, 68 N. E. 568, defendant appealed from a decree quieting plaintiff's title, and assigned as error that she was not shown by any direct evidence to be making any adverse claim. In her answer, however, she had asserted ownership of the property. The court, in affirming the decree, says:

> "It would seem that the trial judge might have found ample proof of appellant's adverse claim when she stood before the court denying appellee's ownership and right of possession and claiming both for herself."

In *Vaca Valley Co.* v. *Mansfield*, 84 Cal. 560, 24 Pac. 145, the defendants in a suit to quiet title moved for a nonsuit on the ground that plaintiff had merely proved his own title and had offered no evidence of adverse interest or claim on the part of defendants. The court says:

> "The obvious answer to this argument is that the complaint alleged, and the answers admitted, that the defendants claimed and asserted an interest in the property. It was not necessary, therefore, for the plaintiff, in opening its case, to offer any proof upon this subject."

In *Blair* v. *Chicago*, 201 U. S. 400, receivers of the street railway corporations, claiming that the franchises of the companies ran until 1960, filed bills for the purpose among others of quieting their title as against the adverse claim of the city that the franchises expired in 1903. As to the contention that the bill could not be

maintained as one to remove cloud on title, the court said (p. 449):

> "We think a case was made out by the allegations of the bills, especially when considered with reference to the admissions of the answer, which showed that the extent and character of the property rights of the corporations whose rights and franchises were the subjects of the receivership were in direct and serious controversy."

In *Bedford-Bowling Green Stone Co.* v. *Oman*, 134 Fed. 441, in which the decree removed as a cloud the claim of an easement not manifested otherwise than by verbal assertion, the court said:

> "If the defendants do not make the claim we have described, there was no necessity or propriety in the vigorous defense and elaborate preparation shown by the large record in the case."

The answer of Mark Skinner Willing and the other adult defendants associated with him as owners of the Walker fee contains the following (R. 169):

> "These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants, and conditions of the leases, if they be valid as leases, even though such removal may be incidental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while the old improvement is being wrecked, and before the new improvement is completed."

The Sears-Slater trustees, representing the owners of the Peck fee, say in their answer (R. 182):

> "These defendants aver that, if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste, and will give the owners of the land described in said Peck lease, according

to the terms thereof, the right to re-enter and repossess themselves of such land, free of any and all claims or rights of plaintiff."

Other allegations of similar tenor are found in both answers, and Louis M. Greeley and Roswell B. Mason, the guardians *ad litem* for the infant defendants interested in each of these fees, are shown by the record to have participated in the trial and to have joined in actively resisting the efforts of the plaintiff to secure relief.

ILLUSTRATIONS OF REMOVAL OF CLOUDS ON TITLE.

The jurisdiction of equity to remove clouds is as broad as the need. It will not be exercised to gratify anybody's curiosity, nor to anticipate fanciful exigencies that may never occur and can be met as well when they do, nor to accommodate the mere convenience of one whose rights can be adequately maintained in a court of law. In most or all of the following cases the jurisdiction could easily have been negatived by the quotation of familiar mechanical rules if the court had been unwilling to exercise its remedial powers.

Spurious stock will be canceled by decree of a court of equity when its existence in the hands of alleged owners clouds the title and impairs the value of genuine stock.

N. Y. & N. H. Ry. Co. v. *Schuyler*, 17 N. Y. 592.
Stebbins v. *Perry County*, 167 Ill. 567.

A suggestive case, in which Mr. Justice Sanborn wrote the opinion, is *Levy* v. *S. H. Kress & Co.*, 285 Fed. 836. A lessor brought an action at law to recover possession on the ground that the lessee, after pulling down a building, had not rebuilt the east wall as required by the lease, but had put up a row of columns

instead. The lessee's answer interposed various defenses, and prayed for a decree quieting defendant's title to the leasehold estate. It was held that the covenants of the lease were in fact broken, but since defendant in its answer offered to do equity a decree was directed permitting it to pay $3,500 as damages in lieu of strict performance of its covenants and *quieting its title* upon its complying with the terms of the decree. In justification of this decree, the terms of which are prescribed in the opinion at length, the court says:

> "All the facts conditioning the rights and equities of the parties to this suit under the lease and under the bond have been proved in this case, and the court below has plenary jurisdiction to consider, determine, and enforce all the rights and equities they claim in this suit against each other, and to make an end of these controversies."

An authoritative decision of this court on the subject of equitable jurisdiction is *Blair* v. *Chicago*, 201 U. S. 400, already cited, in which the chief bone of contention was the date of the expiration of the street railway franchises in the City of Chicago. Receivers alleged, as a basis of equitable jurisdiction, that they had been directed by the court to expend $580,000 for new equipment but were unable to borrow money on receivers' certificates because of the hostile acts of the city, which, in order to force the companies to surrender their franchises, pretended that the Act of 1865 was inoperative to confer upon the companies the rights claimed by them; and that the city, unless enjoined, would proceed to prevent the future occupation of the streets and would destroy the systems. Counsel for the city argued (p. 418) against the sufficiency of the bill as one to remove cloud or quiet title, citing *Holland* v. *Challen*, 110 U. S. 15, *Parker* v. *Shannon*, 121 Ill. 452, and other cases. The attorneys for the companies de-

fended the court's power to quiet the title as within the inherent jurisdiction of equity (p. 435). This court said:

> "While it may be that there would have been no interference on the part of the city with the property while it was in the hands of the court's receivers, still the record shows that the city strenuously contested the asserted rights of the corporations to the franchise to use the streets of the city for ninety-nine years. * * * Without going into further detail upon this branch of the case, we think that the attitude and claims of the city cast a cloud upon the title to this property."

It is hard to think of any one of the stock objections to the jurisdiction of equity to quiet title or remove cloud which might not have been alleged against the power of the federal court to remove as clouds upon the title to the companies' franchises the adverse claims of the city respecting their construction. The cloud was not found in any instrument, recorded or unrecorded, of which the invalidity could only be shown by extrinsic evidence; there was no fear of any interference with the possession so long as the receivership remained in force; the alleged cloud consisted of a claim that the franchises were to be construed otherwise than as the companies claimed; and for all intents and purposes, the only assertion of the adverse claim was verbal. The court, had it so willed, could have found a score of reasons for refusing relief, but having the will to act, it had no difficulty in finding a way. It chose to style the proceeding, in certain of its aspects, a bill to remove cloud and quiet title, but no reader of the opinion can doubt that jurisdiction would have been entertained to relieve an intolerable situation regardless of the name affixed to the bill, or even of its susceptibility of bearing any label. The fact that plaintiffs were receivers appointed by a federal court was material on the ques-

tion of federal jurisdiction, but had no bearing on that of the jurisdiction of a court of equity.

Judge Wilkerson brushed aside *Sharon* v. *Tucker* as being virtually a bill to perpetuate testimony. (R. 557-8.) The decision of this court was that a person who has acquired title by adverse possession may maintain a bill in equity to quiet his title against those who, but for such acquisition, would be the owners. After referring to cases of lost instruments the opinion proceeds as follows:

> "Many other authorities to the same purport might be cited. They are only illustrative of the remedies afforded by courts of equity *to remove difficulties in the way of owners of property using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed.* The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassments to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court." (Our italics.)

Were it necessary to bring the case now before this court within the narrower doctrine upon which *Sharon* v. *Tucker* is thought by the District Judge to rest, we may refer to the present record, which includes voluminous testimony of many witnesses in regard to conditions and occurrences of some forty years ago, without which it would have been difficult or impossible to establish the facts alleged in the bill and deemed essential to the proof of the averments of the plaintiff's bill of complaint. Illustrations may be found in the testimony of Edward H. Taylor (R. 210-213); Morris L. Greeley (R. 213-225); Edwin C. Searles (R. 226); R. Floyd Clinch (R. 227); John Dorr Bradley (R. 284-290); Bernard H. Lichter (R. 290-294); and defendants' witnesses Edward A. Renwick (R. 388, 390), and Paul F. P. Mueller (R. 440-468).

The decision of the Supreme Court of the District of Columbia in *Sharon* v. *Tucker* does not appear to have been reported, but the views of that court were no doubt those expressed by it in the previous year in *Contee* v. *Lyons,* 19 D. C. 207, in which the power of equity to quiet a limitation title was denied. The following reasons, given by the lower court for its decision, have a familiar ring to anyone who has followed the arguments in the present case:

> "The very term 'to quiet a title,' imports that there is something disturbing in it. In point of fact, it appears in this case that the heirs of Contee never agitated their title at all or made any claim whatever, the title simply lying dormant, not being asserted by anybody. As I said, the general implication from the term 'to quiet a title,' is that there is something disturbing it."

This court entertains very different views about the power of equity to quiet titles acquired by limitation. Those views have been followed and asserted with equal emphasis by the Supreme Court of Illinois.

Walker v. *Converse,* 148 Ill. 622.
Atchison Ry. Co. v. *Stamp,* 290 Ill. 428.

Another decision already sufficiently commented upon is *Fulwiler* v. *McClun,* 285 Ill. 174, where the obstacle to the enjoyment of property which the court removed as a cloud on title was a doubt as to the true construction of the instrument under which the plaintiff's title was derived, and where the record did not disclose any adverse assertion of that obstacle.

A building restriction which had become obsolete was removed as a cloud on title in *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372, 109 N. E. 162, and, as the Circuit Court of Appeals points out (R. 607), the attempt of defendants to show that the decision has been repudiated by the court which made it was unsuccessful.

Beyond question, the case most nearly in point on the issue of equity jurisdiction is *Rector, etc.* v. *Rector, etc.*, 201 N. Y. 1, 94 N. E. 191, which arose out of a bitter quarrel between two churches in the City of New York. Nothing could more vividly illustrate the broad and narrow views of equity jurisdiction than the opinions delivered at various stages of this celebrated case. The final decision sustained a decree removing as a cloud on the plaintiff's title a covenant in the deed through which it acquired that title restricting the use of the premises to church purposes. The decree of the lower court was affirmed by a vote of four justices of the Court of Appeals, three justices dissenting, and two opinions were filed, each of which was concurred in by three justices, while the chief justice merely concurred in the result "without indicating," as Judge Wilkerson says, "whether he regarded the general equity powers of the court or the state statute as the proper basis for the action." (R. 557.) It may be noted that neither in the Court of Appeals nor in the elaborate opinions in the court below was there any suggestion of reliance upon the statute. Extracts from the dissenting opinion, in which Judge Wilkerson concurs, are quoted at length in his opinion in the District Court. (R. 556-7.)

St. Stephens Church, the plaintiff, acquired title from the Church of the Transfiguration, defendant, to an uptown lot improved with a chapel. The deed contained a covenant that the property should not be used or occupied except for church purposes. The neighborhood became more populous, the congregation grew, the property increased in value, and plaintiff desired to borrow money on a mortgage for the purpose of enlarging the chapel. Being unable to do so on account of the restrictive covenant, plaintiff filed a bill to remove it as a cloud on the title and obtained a decree, which is

affirmed. The representative quality of the divergent views expressed in this New York church case must be our excuse for a further quotation from the majority opinion in the court below, where the doctrine which finally prevailed, and which Judge Wilkerson regards as unsound, received even greater elaboration than in the Court of Appeals.

> "It is objected that the plaintiff is not entitled to equitable relief of the nature sought in this action, but that, even assuming that the covenant is unenforceable, plaintiff must wait until some attempt to enforce it is made by defendant. The jurisdiction of equity to entertain an action to remove or cancel a cloud on title, notwithstanding there may be a complete defense to any attempt to enforce it, is of long standing and is well established. Ordinarily it is invoked when the cloud consists of some instrument dehors the plaintiff's chain of title, like an infant's deed or a fraudulent mortgage, or an illegal tax assessment. No reason is perceived, however, why the same jurisdiction may not be invoked, in a proper case, to cancel a cloud imposed upon the free use and enjoyment of the property, which, although contained in one of the deeds constituting the chain of title, is of such a nature that its elision from the deed will in no wise affect the devolution of title through the instrument. It is true that no case has been found where this particular relief, under similar circumstances, has been awarded, but it is equally true that no similar case has been found wherein such relief has been refused, and it is the boast and strength of equity jurisdiction that its rules and forms are so elastic that its decrees may be moulded to apply to any case to which the settled principles of equity ought to be applied."
>
> *Rector, etc.* v. *Rector, etc.*, 130 App. Div. 166, 114 N. Y. Supp. 623.

The actual decision recognizes the realities of the situation in which plaintiff was placed, owning a piece

of valuable property of which it was unable to enjoy the beneficial use by reason of an adverse claim under the terms of the deed through which the title was acquired. The adverse claim was a cloud that would in fact be removed by the proper decree of a court of equity if that court was willing to act, and could be dispelled in no other way. The dissenting opinion marshals all the stock objections to separate features of the case: it did not fall under any recognized head of equity jurisdiction; it was not a case of equitable cognizance; when a person brings an equitable action he must maintain it upon some equitable ground; no precedent was cited; if the covenant was invalid, any action at law to enforce it could be defeated; a cloud cannot be found in a provision of the instrument through which the plaintiff's title comes; there being no adverse claim to the property, the covenant could not create a cloud upon the title. This catalogue illustrates the familiar strategy of isolating the component parts of an organized unit and defeating each in detail. With respect to this decision the Court Court of Appeals, in its opinion in the present case, says (R. 607):

> "The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accorded to opinions of the majority of divided courts."

Absence of Remedy at Law as Basis of Equity Jurisdiction.

Given a primary right to the beneficial use of property, and an obstacle to the present enjoyment of the same which would in fact be removed by an appropriate decree, the lack of adequate remedy at law is the

sole and sufficient criterion of equitable jurisdiction. If those conditions exist, relief will never be refused for want of a precedent or procedural formula.

"Equity has followed the true principle of contriving its remedies so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated. It has, therefore, never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed."

1 Pomeroy, Equity Jurisprudence, Sec. 111.

"It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency to meet some new conditions, and was therefore, in its time, without a precedent. If based on sound principles and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

Toledo Ry. Co. v. *Pennsylvania Co.*, 54 Fed. 746.

"All who are conversant with the history of equity jurisprudence know that as a distinct system it has been of constant growth and development from its inception to the present time, covering a period of hundreds of years. The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the

> great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages and all people."
>
> *Dodge* v. *Cole*, 97 Ill. 338.

Our sole excuse for quoting to this court such ancient truisms lies in the insistent endeavors of adversary counsel to demonstrate the incapacity of equity to administer relief except within the straightjacket of pre-established and inflexible forms.

What Is an Adequate Legal Remedy?

If the owner of valuable property is being deprived of the beneficial enjoyment thereof, patient waiting until somebody else chooses to start a lawsuit is not an adequate remedy at law. The only other remedy ever suggested as available to plaintiff is to begin wrecking the building or do some other act which might precipitate a lawsuit. It was at one time seriously argued in this case that the defense of an adverse proceeding thus invited was an adequate remedy at law. Even if it wished to do so, however, plaintiff could not begin wrecking the building without a completed financial program, and the first steps in any financial arrangement cannot be taken until the doubts respecting the right to rebuild have been dispelled. But in any event, modern jurisprudence does not require parties to hazard their entire fortunes upon the correctness of their lawyers' opinions.

There was a time when the law was otherwise. A litigant was required to find the right remedy in the first instance, or else lose his case. In *National Bank* v. *Carpenter*, 101 U. S. 567, the court said:

> "Formerly, upon the allowance of a demurrer to a whole bill, the bill was out of court, and no sub-

sequent proceeding could be taken in the cause. * * * The rigor of this principle was subsequently relaxed."

Under the influence of similar conceptions, judges at one time were unable to regard the forbearance of a doubtful claim as sufficient consideration for a promise. The claim was either good in law or it was bad. If it was finally found to be invalid, the judicial mind was unable to see how its forbearance could have had any value.

Tooley v. *Windham,* Cro. Eliz. 206.
King v. *Hobbs,* Yelv. 26.
13 C. J. 346.

Ever since the decision in *Callisher* v. *Bischoffsheim,* L. R. 5 Q. B. 449, however, it has been established, in spite of an occasional outcropping of the ancient doctrine in a few backward American courts, that forbearance to sue upon a claim not legally enforceable but nevertheless asserted in good faith is sufficient consideration for a promise. In spite of this the mediaeval attitude of mind seems still to persist. We have been repeatedly told that the plaintiff must be either right or wrong; let it choose for itself and bear the responsibility and the consequences of its choice; if it begins to pull down the building, it has a perfect legal defense in case its legal advisers are in the right; if not, let it take its medicine. This course of procedure is what the court was asked to contemplate as an adequate remedy at law; it illustrates a point of view which might once have attracted legally trained minds but is abhorrent to modern ideas of justice.

The same plea has been interposed repeatedly against the efforts of persons or corporations to secure relief from oppressive and arbitrary statutes of undetermined

validity, such for example, as a statute of a state legislature prescribing maximum freight or passenger rates and imposing heavy penalties for disobedience to its provisions. The railroad company can test the law by violating its commands, and defending against a prosecution. The legal remedy in that case exists without doubt, but is it adequate? Modern courts have uniformly decided that it is not. The company in such a case, where the penalty in the event of an adverse decision would be so heavy as to deter it from resorting to a court of law, is entitled to appeal to equity and enjoin the enforcement of the act until its validity is determined, and even if the act is finally adjudged to be valid, no penalties can be enforced for violation of its provisions *pendente lite.*

Ex parte Young, 209 U. S. 123.

Wadley Southern Ry. Co. v. *Georgia,* 235 U. S. 651.

Oklahoma Operating Co. v. *Love,* 252 U. S. 331.

Decisions under the Alien Land Acts of the Pacific States enunciate a similar principle. A typical case was one brought by landowners and a Japanese farmer to whom they wished to make a lease. This they were deterred from doing for fear lest the Attorney General would proceed under the statute to prosecute them and escheat the property. This court in sustaining the bill said:

> "Assuming, as suggested by the attorney general, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture of the property to the state, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the

law deters them. * * * They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights."

Terrace v. *Thompson*, 263 U. S. 197.

Other recent cases in this series, or involving like principles, are

Porterfield v. *Webb*, 263 U. S. 225.
Webb v. *O'Brien*, 263 U. S. 313.
Fick v. *Webb*, 263 U. S. 326.
Pierce v. *Society of Sisters*, 268 U. S. 510.

WAITING TO BE SUED NOT AN ADEQUATE REMEDY.

In *Sherman* v. *Fitch*, 98 Mass. 59, the owners of personal property filed a bill to remove a cloud on the title created by a mortgage which was alleged by the complainants to be void. A demurrer on the ground that complainants had an adequate remedy at law was overruled, the court saying:

"We cannot see that the complainants, upon this state of facts, have any remedy at law. They have no cause of action against the defendant. They are in possession of the property and he has not disturbed their possession. He might bring an action against them, but he does not choose to do it. In the meantime there is a cloud upon their title which seriously affects its value."

In *Voss* v. *Murray*, 50 Ohio St. 19, 32 N. E. 1112, the court said, with respect to the removal of a cloud upon a stock of jewelry:

"That one who has, as an attaching creditor, acquired a lien upon personal property, may maintain a suit for the purpose of ascertaining the extent or existence of adverse claims to the same property or removing clouds upon it that would affect its sale in the proceeding, is supported by principle as well as authority. The property being in the custody

> of the sheriff under the attachment, the creditor has no possessory action against other claimants or lienholders by which the validity of their claims can be determined, and as they may not choose to institute such an action he is without any remedy at law other than to sell the property subject to clouds upon it, which is not an adequate remedy."

The basis of the jurisdiction of a court of equity in all such cases is the lack of an adequate remedy at law, and it is no answer to the appeal for equitable relief that the complainant has a complete legal defense against the adverse claim of which he complains. The lack of remedy at law consists in the very fact that the adverse claimant cannot or will not bring suit. It is not the *assertion* in court of the adverse claim, but the very fact of its *nonassertion* which creates the removable cloud. Courts of equity have frequently dwelt upon the inaction of an adverse claimant as a persuasive argument in support of their own jurisdiction.

> "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity."
>
> *Holland* v. *Challen*, 110 U. S. 15.

The following is from an opinion by the present Chief Justice in a case heard before him and Justices Harlan and Lurton:

> "It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless there is a distraint actual or threatened, and the collecting officer by not distraining may wholly deprive the taxpayer of this remedy. * * * It would seem clear that a court

of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. *The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.*" (Our italics.)

Bank of Kentucky v. *Stone*, 88 Fed. 383.

"In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners."

Fredenberg v. *Whitney*, 240 Fed. 819.

"Must plaintiff sit idly by with folded hands and wait several years until the defendant city shall undertake to levy executions upon his property with the purpose of selling it at judicial sale, and then, and not till then, by motion to quash the executions, or by other remedy at law, raise the question of the validity of the benefit assessment liens? Surely, no. The liens are apparent upon the public records and until their validity and effect is judicially determined, they necessarily hinder the plaintiff in the free and unrestricted use and disposition of his property, thereby casting a cloud upon his title. He is entitled not only to a future but to a present remedy, which is afforded only by a suit in equity to remove the cloud."

Schwab v. *St. Louis*, 310 Mo. 116, 274 S. W. 1058.

"No doubt, if the plaintiff were to proceed to build upon the strip of land in dispute, it is possible that a suit at law would be instituted against him in which his rights would eventually be passed upon. But it is equally possible that no such suit would be

> brought, at least for a period of years. In the meanwhile, the title, not merely the possession, would remain doubtful and unmarketable. But the owner of property has a right not only to use it but to sell it; and in that right, incapable of being enforced in any legal action he can institute, he is entitled to be protected."
>
> *Slegel* v. *Harbine*, 148 Pa. St. 236, 23 Atl. 996.

In the case now before the court, all the lessors need do is to stand idle while the plight of the lessee descends from bad to worse, and unless equity gives relief, the plaintiff will be forever debarred from exercising its right, the existence of which is conceded at this stage of the argument, to replace the present obsolete building by one adapted to the premises.

Declaratory Judgments.

Great stress was laid during the argument of this case in the courts below upon decisions respecting "declaratory judgments," of which *Muskrat* v. *United States*, 219 U. S. 346, and *Anway* v. *Grand Rapids Railway Company*, 211 Mich. 592, 179 N. W. 350, were cited as conspicuous examples; rather, it may be supposed, on account of certain language in the opinions than because of any application of the cases themselves to the one at bar. The doctrine, which is stated in many forms, is in substance that equity will decline jurisdiction to declare legal rights not involved in any existing controversy for mere purposes of future reference. No useful purpose would be subserved by examining in detail at the present time the numerous cases in the state courts in which this view has been enunciated. The principle itself, abstractly considered, is clearly sound. Courts are not organized to try moot cases. As with every abstract statement of legal doctrine, the virtue of this principle

depends upon its application. A plaintiff's embarrassments may be remote or contingent or speculative in varying degrees, or they may be actual and imminent. Courts will differ in their estimates of the urgency of any given situation. We do not pretend to reconcile all the decisions with our own views of equitable competency. In a given case, however, it is not important to determine where a dividing line is to be drawn, so long as it is perfectly clear that the case lies on a certain side of the line wherever drawn. Such is the one now before the court, and we do not think anybody will seriously argue that it is lacking in the requisite of immediacy.

It is doubtless true that courts ordinarily refuse to enter judgments declaring rights with respect to which no present cause of controversy exists, but this doctrine does not affect the jurisdiction of equity to remove clouds from title. That jurisdiction ordinarily rests on the existence of actual or imminent claims which do in fact impair the value of property. To say that a decree annulling such a claim is merely a declaratory judgment, in the obnoxious sense of that term, is merely to say that the particular claim under consideration is not a cloud on title. Any other conclusion would be a mere denial of the existence of this branch of equitable jurisdiction.

The complicated problems incident to modern social, commercial, and industrial development often make it very important that the rights of parties be settled before they are directly involved in litigation. Generally the courts have not shirked the task when the necessity of an adjudication was sufficiently urgent, but they have been and are naturally reluctant to take jurisdiction of questions of a remote or speculative character, and they have not always been at one about the degree of vex-

atiousness that will warrant such intervention. The expediency of giving the courts jurisdiction to pronounce declaratory judgments in all cases without distinction may be debatable, but the movement in that direction indicates a widespread feeling that a freer exercise of this jurisdiction is needed to meet the exigencies of the business world.

Various decisions of this court now for the first time cited, such as *United States* v. *Hamburg-America Co.*, 239 U. S. 466, and *United States* v. *Alaska Steamship Co.*, 253 U. S. 113, merely announce the salutary and uncontroverted doctrine that courts will not hear a case after it has been settled or has otherwise become moot. Whatever divergencies may be found among the decisions in the state courts, we believe no federal decisions give any countenance to the alleged incompetence of a court of equity to relieve an owner of valuable property rights from a plight so immediate and so injurious as that disclosed by the present record.

II.

FEDERAL JURISDICTION.

The active defendants in this cause occupy two camps, having identical interests but employing opposite tactics. The Peck fee belong to the Sears-Slater trustees, who removed the cause to the federal court; the Walker fee to the Willing trustees, who sought to remand it to the Circuit Court of Cook County where it originated. One group of defendants contends that the plaintiff's causes of action cannot be prosecuted together; the other that they cannot be prosecuted separately. Thus one or other of them is in a position to allege error whichever argument might prevail. The Sears-Slater trustees not only claimed to have a separable controversy with the plaintiff, but contended that the bill was multifarious (R. 212) as improperly joining two or more distinct and unrelated causes of action. The Willing trustees originally made the same claim (R. 137), but after denial of their motion to dismiss the bill (R. 140) they faced about and moved in the District Court for a remanding order (R. 194) on the ground that the cause of action set forth in the bill is single and indivisible, and not even susceptible of being resolved into separate controversies. After dismissal of the bill by the District Court, they did not renew the motion in the Circuit Court of Appeals until that court had reversed judgment and entered its order remanding the cause to the District Court. (R. 609.) This order was dated June 7, 1927, and it was on the 25th of that month that motion was filed in the Circuit Court of Appeals to vacate all orders and remand the entire cause to the Illinois state court. (R. 631.) Their contention in that motion was again that the controversy was "single and entire." They never found

this case so inseparable from that of the other defendants as to lead them to object to the jurisdiction of the federal courts except at such times as the battle seemed to be going against them.

The main difference between the Act of 1866, which first gave the right to remove a separable controversy, and the present Act of 1875, is that the removal under the latter act of a separable controversy carries the whole cause into the federal court. Except for that difference, the language of this court in the leading case of *Barney* v. *Latham*, 103 U. S. 205, with respect to the Act of 1866 is entirely applicable to the one now in force:

> "It proceeds, plainly, upon the ground among others that a suit may under correct pleading embrace several controversies, one of which may be between the plaintiff and the defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although the citizen of another state under the particular mode of pleading adopted by the plaintiff is made a co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separable controversy, be required to remain in the state court and surrender his constitutional right to invoke the jurisdiction of the federal court."

The reasons which led Congress to amend the procedure by providing that all defendants who are properly joined as such must follow the case into the federal court are thus set forth in *Barney* v. *Latham:*

> "Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the federal court and leaving others in the state court for determination. It was often convenient to embrace in one suit all the controversies which were so far connected by their

> circumstances as to make all who sue, or are sued, proper though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions Congress determined that the removal of the separable controversy to which the judicial power of the United States was by the Constitution expressly extended, should operate to transfer the whole suit to the federal court."

The present case was properly removed to the District Court unless a separate suit in the federal court against the Sears-Slater defendants to obtain, with respect to their properties alone, the relief sought by the bill of complaint would have been necessarily dismissed for non-joinder of the Willing defendants, who are citizens of the same state as plaintiff and whose joinder as defendants would therefore oust the jurisdiction of the court. The question whether the controversy in this cause with the Sears-Slater interests is separable within the meaning of the Removal Act, and the question whether the Willing defendants would be indispensable parties to a suit brought for the relief sought in this bill against the Sears-Slater defendants alone, are one and the same.

> "The case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."
>
> *Fraser* v. *Jennison,* 106 U. S. 191.

Such is the test of federal jurisdiction in removal cases established as the settled law of this court ever since the decision in *Barney* v. *Latham,* 103 U. S. 205, in which the plaintiff sued a corporation of his own state and individual citizens of other states, and in sustaining

the right of the latter to remove the cause on the basis of their separable controversy this court said:

> "With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company."

This criterion is conceded to be the true one, and it devolves therefore on parties disputing the jurisdiction of the District Court in this cause to demonstrate that the relief sought by plaintiff against the Sears-Slater defendants could not have been granted in a separate suit against them alone. This means, *first,* that if the separate suit had been brought against them in a state court, they could have defended it successfully on the ground that the Willings were *necessary* parties, and *secondly,* that if the separate suit were in the federal court it could not be entertained at all because the Willings were *indispensable* parties and could not be sued in that forum. The two questions are by no means the same. We think, however, that counsel for petitioners misconcieve the nature and object of the bill of complaint. In their petition for a writ of certiorari (p. 11), and again in their brief (p. 36), it is argued that any relief under the prayer of the bill of complaint "must be spread over the whole property as against all the fee owners, all the bondholders, the mortgage trustee, and all others interested," whence the conclusion is drawn that "there was only one controversy, which affected

alike all the defendants." The assertion that "relief must be spread over the whole property" appears to us to be a vague generality devoid of definite meaning and having no basis in the pleadings. The plaintiff does not ask a decree requiring the Sears-Slater defendants or anybody else to remove the building which stands on their property. In the separable controversy to which they are parties, the decree sought by plaintiff would not operate upon the building but only upon them individually. If plaintiff began to wreck the building after entry of a decree against them, every other party would have identically the same rights and remedies as if no such decree had been made. It would not give or purport to give, except as against the Sears-Slater defendants alone, any right to disturb the present structure, and the Willing defendants could not be prejudiced thereby, even if it were true, as they seem to suppose, that they have an easement for the perpetual maintenance of a worthless and burdensome building which has entirely survived its useful life. This supposititious easement could suffer no diminution by any decree binding alone on the Sears-Slater defendants.

The specific relief sought by the present bill of complaint (R. 31) with respect to the Sears-Slater (Peck) interests is a decree (1) removing from the Peck leasehold the obstacles which prevent the present enjoyment and use thereof by its owners, consisting of the cloud cast thereon by the claims and doubts about the plaintiff's right under its lease; (2) quieting and establishing the plaintiff's title to the Sears-Slater (Peck) leasehold as a title which includes the "full right" of the owner thereof, as against the Sears-Slater defendants, to remove any buildings from the same upon giving such security as the court may direct, all as incidental to the erection thereon of a more valuable building; and (3)

as an incident and corollary of the primary relief, enjoining the Sears-Slater defendants from attempting to assert a forfeiture of the lease of their land by reason of such acts of the plaintiff, and from taking any steps to prevent removal by plaintiff of the building now located on the Sears-Slater (Peck) property. If all of this relief were granted against the Sears-Slater defendants, what right of the Willing defendants would be lost, impaired, qualified or altered in any way? Such a decree against the Sears-Slater defendants could not derogate from any right which the Willing defendants may have to resist, in court or out, any attempt of the plaintiff to remove the Auditorium Building.

Separable Controversies and Indispensable Parties.

A necessary party under the ordinary rules of equity is often not an indispensable party as that term is used in defining federal jurisdiction. It was the practice of the High Court of Chancery to require all persons to be brought before it whose presence would promote a complete settlement and disposition of all controversies with respect to the subject matter of the litigation, but in a great many cases the court dispensed with this requirement as to parties outside of the realm and proceeded to a decree as between those whom it could reach. The same principle has always been applied by the federal courts of this country with respect to persons who might be deemed necessary parties but whose citizenship would prevent them from being joined as such without ousting the jurisdiction of the court. These principles were fully established long before Congress authorized the removal of separable controversies, and they are the decisive factor in determining whether a controversy is in fact separable within the meaning of the Removal Acts.

Chief Justice Marshall pointed out in *Russell* v. *Clarke's Executors,* 7 Cranch. 69, that the question for a federal court to determine before declining jurisdiction is, whether a decree can be entered by the court, as between the parties before it, "without essentially affecting the interest of absent persons"; and in *Elmendorf* v. *Taylor,* 10 Wheat. 152, the same learned chief justice said:

> "In the exercise of its discretion the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as, if such party be a resident of some other state, ought not to prevent a decree upon its merits."

In the leading case of *Shields* v. *Barrow,* 17 How. 130 these principles are more definitely elaborated by Mr. Justice Curtis, who, in language frequently reiterated in later decisions, refers to and develops Chief Justice Marshall's classification of parties as follows:

> "1. Formal parties.
>
> 2. Persons having an interest in the controversy, and who ought to be made parties in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and final justice without affecting other persons not before the court, the latter are not indispensable parties.
>
> 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

A convenient and comprehensive summary of the federal law respecting parties in equity has been given by Judge Sanborn in substantially identical language in a number of cases, of which the following is from *Sioux City Terminal Co.* v. *Trust Co. of North America*, 82 Fed. 124:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party under the old chancery rule unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. If, however, such a party is incapable of being made a party, or if his joinder would oust the jurisdiction of the court as to the parties before it, the suit may proceed without him, and the decree will not affect his interests."

The parties whose citizenship is alleged to withdraw the present case from the jurisdiction of the federal court are the owners of the Walker fee, otherwise known as the Willing defendants, and the trustee under the two mortgages upon plaintiff's leasehold estates. The Chapin trustees, though taking no active part in this contest, stand in the same relation to the removable controversy as the Willing trustees, but are generally omitted from this discussion for purposes of simplicity. We re-

spectfully submit that several causes of action are combined in this suit in accordance with approved equity practice; that it lies in the choice of the plaintiff whether to unite them or to bring separate suits; that such joinder does not make the bill multifarious, and if it did the objection would not go to the jurisdiction of the federal court; that on the other hand, these causes of action are not joint and the effect of their joinder is not to make them so; and that the mortgage trustee is in no sense an indispensable party to the relief sought against the Sears-Slater defendants.

The contention of petitioners is and must be that the bill, if filed against the Sears-Slater interests alone, would necessarily have been dismissed because the Willings were not parties and could not be made such without defeating the jurisdiction of the court. They did not conceive their interests as so inextricably blended with those of the Sears-Slater defendants when they moved the District Court to dismiss the bill of complaint—

> "because the said amended bill is multifarious in that it joins as codefendants with these defendants persons not interested in or with respect to the so-called Walker leases (in which alone and in the premises thereby demised these defendants are interested) but in other and different leases by other lessors demising other and different premises to the complainant herein." (R. 137-8.)

Now they say there is in the case only one controversy, which affects all the defendants alike; and this too in the face of their major contention that the bill is fatally defective because it asks only for an academic declaration of the rights of the parties. The District Judge condemned the bill because it does not ask for a decree that anybody do anything, and yet the petitioners now insist that the relief which it prays for against the Sears-Slater defendants would prejudice their own interests.

No doubt this court, in passing on questions of federal jurisdiction, may determine the nature of the suit for itself without necessarily adopting the views of parties or their counsel who raise the objection, but we do not believe that this court need wholly ignore the views persistently urged by the objectors at various stages of the litigation regarding their own position in the suit.

The most obvious example of a decree which would injure absent parties is one operating directly upon property in which they have an interest. The early case of *Russell* v. *Clarke's Executors*, 7 Cranch, 69, was essentially a case of that character. The decree sought by the bill would have swept away the fund itself. *Williams* v. *Bankhead*, 19 Wall. 563, illustrates the same principle. The bill related to the actual disposal of a fund in which a nonresident widow had an interest. In like manner, all members of a partnership are deemed to be indispensable parties to a decree affecting the disposition of a fund belonging to the firm.

Raphael v. *Trask*, 194 U. S. 272.

An entire bond issue cannot be canceled by a decree unless all holders of the bonds are before the court.

Brown v. *Trousdale*, 138 U. S. 389.

A bill to settle the ownership of stock and procure the issue of new certificates requires action by the corporation and cannot ordinarily be maintained in its absence.

Kendig v. *Brown*, 97 U. S. 423.
St. Louis Ry. Co. v. *Wilson*, 114 U. S. 60.
Crump v. *Thurber*, 115 U. S. 56.

Where a bill seeks, through an accounting or the recission of fraudulent transfers or otherwise, to create and define a fund in which various persons are interested,

the amount of the fund thus to be established is something that affects them all, and all are necessary parties; but when a definite or aliquot share in a fixed fund can be allotted to the plaintiff without prejudice to the rights of others, the latter may be dispensed with.

Hagan v. *Walker*, 14 How. 29.

Wood v. *Dummer*, 3 Mason 308; 30 Fed. Cas. No. 17944.

Greene v. *Sisson*, 2 Curt. 171; 10 Fed. Cas. No. 5768.

Tobin v. *Walkinshaw*, 1 Mc All. 26; 23 Fed. Cas. No. 14068.

Martin v. *Fort*, 83 Fed. 19.

Those cases illustrate the general principle that a decree which merely settles rights as between the parties to the suit, without operating upon the property in which those rights inhere, cannot be regarded as injuriously affecting other persons having rights in the same property who cannot be brought into court.

A proceeding to recover possession of personal property and procure delivery thereof differs from one in which the object is merely to determine the ownership of the property. In the former case a third person in possession of the property is an indispensable party because any decree must bind him in order to be effective; otherwise, when the object of the suit is merely to determine the ownership.

Wilson v. *Oswego Township*, 151 U. S. 56.

Construction Company v. *Cane Creek Township*, 155 U. S. 283.

Salem Trust Company v. *Manufacturers Finance Company*, 264 U. S. 182, 190.

The facts appearing in *Waterman* v. *Canal-Louisiana Bank Co.* 215 U. S. 33, were that a testatrix had died in New Orleans leaving four heirs, one of whom, a niece residing in Chicago, filed the bill in the Louisiana federal court against the executor and two of the other heirs, named Waterman, alleging that the fourth heir, one Davis, was a resident of Alabama and beyond the jurisdiction of the court. Plaintiff claimed to have become solely entitled to certain lapsed or void legacies on the ground that the other heirs had renounced their rights as such, and she asked for a decree establishing her rights as against the defendants, directing an account of the estate in the hands of the executor, and ordering the executor to pay over to her as sole heir the amount so found due. A decree dismissing the bill for want of jurisdiction is reversed, and it is held that the absentee heir, Davis, was not an indispensable party. A decree, while it could not invade the exclusive jurisdiction of the Probate Court to retain possession of the property and determine the amount of the estate, could fix the rights of the parties actually before the court without prejudice to those of Davis. On this point the court said:

> "If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne* v. *Hook*, 7 Wall. 425. * * * With the parties before it the court may proceed to determine whether, because of the acts alleged in the bill, the heirs at law of Mrs. Tilton were entitled to recover because of the lapsed legacy. If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the com-

> plainant and the Watermans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest."

The causes of action in the Auditorium case against the different groups of defendants are several and not joint, and arise under separate instruments. They were combined for convenience of litigation, and it rested in the discretion of the plaintiff whether to bring one suit or more. The liberty of choice was at least as great as that of the plaintiff corporation in *Bitterman* v. *Louisville Railroad Company*, 207 U. S. 205, when it filed a single bill to enjoin seven ticket brokers from selling nontransferable round-trip tickets issued at reduced rates, and this court, in affirming the decree, said:

> "The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and therefore might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions."

The bill was not multifarious, and if it had been, that fact would have no bearing on the question of federal jurisdiction:

> "No complaint is multifarious which presents a common point of litigation the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but

it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others."

Elder v. *Western Mining Co.* 237 Fed. 966, 977.

At common law, where two or more persons are liable the cause of action is either joint or it is several, or if it is joint and several it becomes one or the other at the election of the plaintiff. The joinder of causes of action in equity is a matter of convenience and discretion, and cannot in any event affect the jurisdiction.

Barney v. *Latham*, 103 U. S. 205.

Graves v. *Ashburn*, 215 U. S. 311.

Commodores Point Terminal Co. v. *Hudnall*, 283 Fed. 150, 171.

Schell v. *Leander Clark College*, 2 Fed. (2d) 17.

The argument has been advanced, resting on a false analogy with actions at law, that the joinder of separate causes of action in a single suit converted them into a single joint cause of action. That is a doctrine appertaining to legal causes of action which are technically joint and several. If two persons are jointly and severally liable at law, and the plaintiff brings a single action against both, his election to treat the liability as joint cannot be questioned by either defendant. In such a case, one of the defendants who is a citizen of a state other than that of the plaintiff has no separable controversy, and this is generally true even though the complaint shows that the joint liability alleged by the plaintiff does not in fact exist. The absence of joint liability is a substantive defense which does not enable a defendant to assert the existence of a separable controversy so long as the plaintiff continues to prosecute his suit

in the form which he has elected to adopt even though his own pleadings negative his right to adopt it.

Pirie v. *Tvedt*, 115 U. S. 41.

Louisville & Nashville R. R. Co. v. *Ide*, 114 U. S. 52.

Alabama Southern R. R. Co. v. *Thompson*, 200 U. S. 206.

Illinois Central R. R. Co. v. *Sheegog*, 215 U. S. 308.

Chicago, Rock Island & Pacific Ry. Co. v. *Dobell*, 229 U. S. 102.

Hay v. *May Department Stores*, 271 U. S. 318.

Such cases always involve a cause of action which is in fact joint at the election of the plaintiff, and the principle invoked has no application to equity, in which "a suit may under correct pleading embrace several controversies," and in which Congress has recognized that "it was often convenient to embrace in one suit all the controversies which were so far connected by their circumstances as to make all who sue or are sued proper though not indispensable parties."

Barney v. *Latham*, 103 U. S. 205.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.

In a suit to quiet title which had been removed from a state court, the District Judge denied a motion to remand, and after referring to the doctrine of *Pirie* v. *Tvedt*, 115 U. S. 41 and other similar cases, said:

> "The present case does not come within the principle of these decisions. The bill to quiet title was not filed to settle a single controversy. It was filed for the purpose of adjudicating any and all adverse titles held by the defendants and each of them."

Bacon v. *Felt*, 38 Fed. 870.

And in *Venner* v. *Southern Pacific Co.* 279 Fed. 832, commented upon below, it was pointed out that the doctrine of this court with respect to actions at law against two or more tortfeasors or contractors on a joint and several liability was inapplicable to proceedings in equity.

Wherever a separable controversy exists in equity it is because the plaintiff has chosen to combine in one suit two or more controversies which he might have pursued separately, and if his election to unite distinct causes of action in one proceeding operated to convert them into a single indivisible cause of action the provisions of the Removal Act would be meaningless.

If the different groups of defendants were sued on a joint liability, or if the object of the suit were to set aside or otherwise affect some instrument under which they all claimed as their common source title, it may be that under the authorities no one of those groups would have a separable controversy. Wanting those conditions, the controversies are separable. In the present case the different groups of defendants own separate tracts, but the criterion suggested would hold good even if they owned undivided interests in the same tract as tenants in common.

A purchaser of land brought suit in a state court against the heirs of his grantor to set aside as a cloud upon his title "some claim to the premises" which they were setting up, and it was held that one of the heirs with the requisite diversity of citizenship had a separable controversy which was separately removable under the Act of 1866. Reasons given by the court were as follows:

> "If the defendants have any interest at law or in equity in the premises, they must claim as the heirs of their ancestor or the donees of the United

States. In that case they must claim as tenants in common. If so, the interest of each in the land would be distinct from that of the other, and the suit might be separate as to each of them."

Field v. *Lownsdale*, 1 Deady 288; 9 Fed. Cas. 4769.

In justification of a removal of the entire cause under the Act of 1875 under similar circumstances the court said:

"The district judge, with the concurrence of the circuit judge who was consulted, denied the motion, upon the ground that if the defendant Warren had any interest in the premises, he was simply a tenant in common with the complainants, and that therefore the controversy, so far as he was concerned, could be determined without the presence of the other defendants as parties."

Goodenough v. *Warren*, 5 Sawy. 494; 10 Fed. Cas. 5534.

The same question was presented in its other aspect in a suit brought by a nonresident plaintiff in the federal court to quiet his title to an undivided five-eighths of a tract of land. The defendants pleaded in abatement that the owners of the other three-eighths, including Walker and Dickinson, who could in fact not be joined without depriving the court of jurisdiction, were necessary parties. Judge Deady overruled the plea and, after quoting from page 571 of the opinion of Mr. Justice Bradley in *Williams* v. *Bankhead*, 19 Wall. 563, said in part:

"Admitting that the defendants and Walker and Dickinson claim each an interest in this property adverse to the plaintiff as set forth in the plea, they must claim as tenants in common, and therefore the claim of each is separable and distinct from the other, although it may arise in the same way and be established by the same proof. The case falls within the third of Mr. Justice Bradley's categories.

> Walker and Dickinson have an interest in the subject matter, and their claim being of the same nature as the defendants and growing out of the same circumstances, they might be joined in this suit, at the option of the plaintiff, as a matter of convenience to him. * * * The fact that the determination of the controversy in this suit will not settle any controversy the plaintiff may have with Walker and Dickinson touching any claim they may make to the property is not a matter which concerns these defendants."
>
> *Goldsmith* v. *Gilliland*, 24 Fed. 154.

A claimant of land brought suit under the Iowa code to recover possession from the occupant, who was alleged to hold under a lease from the other defendants, and to recover damages for injury to the buildings and conversion of the crops, and to settle all adverse claims of title on the part of all defendants. The occupant was held to have a separable controversy which entitled him to remove the cause to the federal court. In an opinion denying a motion to remand the District Judge said:

> "The petition does not aver that all the defendants claim title to the realty jointly, or under one common source of title; nor does it aver that they jointly converted to their own use the crops growing on the land, or that they jointly injured the buildings for which the damages are prayed. * * * The decisions, therefore, defining the rule applicable to suits based upon joint or joint and several causes of action do not touch a case of the peculiar character now before the court."
>
> *Stanbrough* v. *Cook*, 38 Fed. 369.

Another decision in the same circuit arose out of a bill filed in the state court by part of the heirs of a deceased landowner to quiet their title and remove the cloud of a deed executed by the administrator of such former owner, and for an accounting of rents and prof-

its. Among the defendants was a railway company, which claimed a part of the premises and removed the cause to the federal court. On motion to remand the plaintiff cited the decisions with respect to actions at law sounding in tort or contract, wherein it was held that a defendant sued jointly with a codefendant could not create a separable controversy by pleading a separate defence. These precedents were held to be inapplicable, since "the bill to quiet title was not filed to settle a single controversy."

Bacon v. *Felt*, 38 Fed. 870.

Another suit to quiet title was brought in a California state court by a citizen of that state alleging that defendants claimed some interest in the property, the nature of which was to the plaintiff unknown. One of the defendants removed the case to the federal court on the ground that he had a separable controversy, and Judge Morrow denied a motion to remand, saying:

> "The plaintiff does not aver that all the defendants claim title to the realty jointly, or under one common source of title. * * * Where an action is brought by one plaintiff against several defendants, not because they claim any joint interest or are subject to any joint liability in respect to the subject matter of the action, but merely for convenience, it will generally be capable of resolution into separable controversies between the plaintiff and the individual defendants."

Bates v. *Carpentier*, 98 Fed. 452.

In a similar suit against three groups of defendants to quiet title to mining property removed from a state court by one of the groups, the District Judge, in refusing to remand the cause, said in the course of his opinion:

> "There is no averment that the defendants claim under any common source of title or of right. The

> defendants are not jointly mentioned, except by groups, viz.: (1) Canton Mining Company, Mrs. McKinley, and Mrs. Barber, (2) McKinley Mining & Smelting Company, and (3) the Carothers family. There is no averment that the defendants mentioned in the first group are jointly interested in any way with the defendants mentioned in the third group. From these averments it is manifest that this case does not come within the principles announced in *Torrence* v. *Shedd*, *supra*, or of any of the authorities therein cited, which are relied upon by plaintiff herein as sustaining his motion."
>
> *Carothers* v. *McKinley Mining Company*, 116 Fed. 947.

A bill was filed in a federal court in North Carolina to remove a cloud on title and for the usual injunction and general relief. Among the defendants were two citizens of the District of Columbia, as to whom the Circuit Judge permitted the plaintiff to dismiss his bill, holding that they were not indispensable parties for the following reasons:

> "The proper test is whether, in this suit, a decree can be entered without affecting the interests of the defendants beyond the jurisdiction of the court. It cannot be seriously contended that a decree of this court declaring the complainant to be the owner of the lands in controversy and restraining the other defendants from asserting title to the same could in the slightest degree affect any claim which the defendants Grinnell and wife may have to an interest in the property."
>
> *North Carolina Mining Co.* v. *Westfeldt*, 151 Fed. 290.

In another suit which was removed from the state court by the Halleck Cattle Company, the character of the suit and the ground for denying a motion to remand are indicated by the following extract from the opinion of the District Judge:

> "The suit was brought to quiet plaintiff's title

to the use of the first 25 cubic feet per second of the waters flowing in Boulder creek, a natural surface stream of water, situated in Elko county, Nevada Beside the Halleck Cattle Company, there are nine defendants arranged in three groups. The complaint contains no allegation which in any manner indicates that Halleck Cattle Company's use or appropriation of the waters of the creek, or its claim of title thereto, is in any way connected with the use, claim or appropriation of any other defendant or defendants, except that each defendant is interested in the same stream, the waters of which are insufficient to answer the aggregate demands of all. * * *

The present case can be separated into parts so as to leave a separate and distinct cause of action between Samuel McMullen, a citizen of Nevada, and Halleck Cattle Company, a citizen of California. On this cause of action a separate and distinct suit could have been brought, and the full nature and extent of the company's claim to the use of said 25 cubic feet per second of the waters of Boulder creek could be determined as against complainant, without the presence of any other defendant as party to the controversy. The motion to remand must be denied."

McMullen v. *Halleck Cattle Co.* 193 Fed. 282.

This consensus of opinion in the lower federal courts is enough to show that the controversies in the present case would be deemed separable even if the Willing defendants had owned an undivided fractional interest in the Sears-Slater property, instead of the easements which they claim in their brief.

Many other cases, though not involving clouds on title, define separable controversies on the basis of principles applicable to the present case.

Barney v. *Latham,* 103 U. S. 205.

Geer v. *Mathiesen Alkali Works,* 190 U. S. 426.

Winfield v. *Wichita Natural Gas Co.* 267 Fed. 47.

Venner v. *Southern Pacific Co.* 279 Fed. 832 (Certiorari denied, 258 U. S. 628).

Old Dominion Oil Co. v. *Superior Oil Corporation,* 283 Fed. 636.

Davidson v. *Montana-Dakota Power Co.* 22 Fed. (2d) 688.

JOINDER OF THE MORTGAGE TRUSTEE.

We now come, with as much patience as the contention admits, to the last phase of the petitioners' argument against the jurisdiction of the federal court. The Illinois Trust and Savings Bank, now Illinois Merchants Trust Company, is in its relation to the separable controversy merely the trustee under mortgages of the plaintiff's leasehold estate in the Peck property. In view of the remoteness of any connection between the interest of the Willing defendants in their own fee on the one hand and that of the trustee in the property of the Sears-Slater defendants on the other, we can see in the arguments of petitioners on this point nothing better than the suggestions of *amici curiae*, to be given the same degree of attention as if a stranger had asked this court to interpose the objection on its own behalf.

Even if the plaintiff were the party insisting that the cause should have been remanded to the state court, the obvious answer would be that the Sears-Slater defendants themselves, as lessors of the Peck fee, are strangers to the mortgage made by the lessee on its leasehold estates therein. What arrangements or adjustments the plaintiff may finally make with its bondholders or the trustee is something which does not concern the Sears-Slater defendants, and which, if possible, concerns still less the Willing defendants. As if, however, this court had of

its own motion invited argument on that point, we proceed to offer a few comments on the relation of the mortgage trustee to the controversy between the plaintiff and the Sears-Slater defendants.

In their petition for a writ of certiorari (p. 11) and again in their present brief (p. 17) the petitioners say that the "mortgage trustee is a necessary party defendant, actively resisting respondent's suit, and is a citizen of Illinois." The accurate portion of this statement is the one with respect to the citizenship of the trustee. The record does not show the trustee to have been "actively resisting" plaintiff's suit at the time of its removal from the state court. What the bill of complaint alleged was (R. 29) that the bondholders were favorably disposed to the erection of a suitable building, but were entitled to be heard about the security or other terms which might be prescribed by the court as a condition thereto, and that they were fully represented in the cause by the Bank as their trustee. The demurrer interposed by the Bank in the state court (R. 104) was on the ground that it was not empowered by the terms of the trust deed to represent the bondholders in a suit of this peculiar character and that the bondholders were accordingly themselves necessary parties. The demurrer gave nine reasons in that many separate paragraphs why the reconstruction of the building was a matter unrelated to the functions of the trustee under the mortgages; all tending, however, to the one conclusion, repeated at the close of each paragraph, that the bondholders themselves "are necessary parties to this suit, and this court cannot properly proceed with this cause until they are made defendants hereto and brought into this suit." The trustee was in no sense "actively resisting" the suit, but was merely dis-

claiming authority to represent the bondholders with respect to the subject matter thereof.

While the right of removal is determined by the record at the time the petition was filed, some light is reflected upon the situation at that time by subsequent proceedings in this cause. Plaintiff acquiesced in the disclaimer of the trustee, and amended its bill by designating members of each of the two groups of bondholders as representatives of their class and making them defendants in that capacity (R. 126, 127), and each of these representative groups filed an answer (R. 151, 153) concurring in the prayer for relief on condition that adequate security be required by the court before the present building was pulled down in accordance with the offer made in the bill. There was probably no necessity for joining the trustee or bondholders as parties to this cause at all, since it is a financial axiom that a new building for the Auditorium site could not be financed without retirement of the bonds or satisfactory arrangements with the bondholders; if they were joined, their interest was truly stated in the petition for removal to be on the side of the plaintiff. Every conceivable doubt on that point was eliminated by the subsequent position taken by the bondholders. In order to allay any possible compunction of the trustee as to its having discharged its full duty in the premises, the plaintiff, with its cooperation, caused notices to be mailed (R. 205, 207) to all known bondholders, apprising them that any one of their number was entitled to appear by independent counsel if not satisfied to be represented by the selected group.

Whether to save or defeat the jurisdiction of a federal court, a party will be counted on that side of the controversy where the court thinks he belongs, regardless of

his formal designation as the plaintiff or defendant on the face of the record.

Pacific Railroad Company v. *Ketchum,* 101 U. S. 289, 299.

Carson v. *Hyatt,* 118 U. S. 279, 286.

Steele v. *Culver,* 211 U. S. 26, 29.

Niles-Bement Coal Company v. *Iron Moulders' Union,* 254 U. S. 77.

If the Bank had been trustee under a mortgage on the Sears-Slater fee more might be said for the argument that it would be a necessary party to the plaintiff's controversy with the Sears-Slater defendants, though even then we think it clear from authorities already adduced that the argument would be fallacious. Since, however, plaintiff itself is the only link, if any exists, between the Bank and the owners of the Peck (Sears-Slater) fee, the remoteness of any issues which plaintiff might conceivably have with the Bank from its controversy even with the Sears-Slater defendants is manifest. We do not believe it would be possible to find any direct authority on this specific objection to the federal jurisdiction as now advanced by the petitioners, because we do not suppose such a question was ever raised. The Bank as trustee is a total stranger to the owner of the Peck fee. Any rights which it may have are merely derivative from those of the plaintiff. What effect the replacement of a building might have upon the mortgage security is a question between the plaintiff and the Bank, with which the owners of the fee have no vestige of concern. Any defendant in an ordinary suit to remove a cloud from the owner's title might as well refuse to answer the bill of complaint unless the mortgagee under a mortgage from the owner were made a codefendant.

III.

PLAINTIFF'S RIGHT TO REBUILD.

In its reply to the petition for a writ of certiorari this respondent urged (pp. 6, 20) that if the writ were granted, the entire controversy be now disposed of upon the merits, pointing out that all available evidence is in the record and there is no controversy about any essential fact, and emphasizing the disastrous consequences to it of further prolongation of the litigation in the lower courts. The petitioners in their brief have ignored these suggestions and elected to stand on the dilatory jurisdictional issues. We assume that if this court recognizes the propriety of a final adjudication, it will not be deterred by any implications in the petitioners' brief with respect to their view of the scope of the issues now properly before the court and the points to which they have seen fit to limit their argument.

As an adequate summary of "the facts averred in the pleadings and established by the evidence," we again refer to the statement of the District Judge in his opinion in this case. (R. 545-548.) While we think this alone would be enough, the gravity of plaintiff's predicament cannot be fully realized without a consideration of the evidence in somewhat greater detail.

The ground covered by the leases in controversy was, at the time of the making of the leases, at the extreme southerly limit of business development, and was in the stage of transition from residential to commercial uses. (R. 210, 217, 226, 227, 284.) The improvement of the district south of Congress street began about 1893 (R. 246), after the construction of the Congress Hotel Annex. (R. 228.) Michigan avenue is now the most promi-

nent street in the city, and is becoming more so every day, for shops, hotels, and office buildings (R. 228), being now lined with skyscrapers for many blocks on both sides of the Auditorium, and it is now the show street of the city. (R. 285.) With reference to the transformation of the district, attention is invited especially to the testimony of Edward H. Taylor (R. 210-213), Edwin C. Searles (R. 226), R. Floyd Clinch (R. 227-8, 246-7), and John Dorr Bradley (R. 285-9).

When the leases were made the Michigan avenue frontage was worth from $800 to $1,200 a front foot, and the Wabash avenue frontage from $800 to $1,600. (R. 287.) Wabash avenue was the better street. (R. 212.) The ground values stated in the Auditorium leases as a basis for figuring the rent were rather above than below the actual market values. (R. 287.) By reference to the Peck and Walker leases it may be seen that an aggregate valuation of $613,500 was placed by them upon the fees at the time the leases were made. The fair value of these fees, unimproved and unencumbered, at the time of the trial was $3,618,000. (R. 286-7.)

The general taxes have mounted from $22,707.78 in 1890 to $157,678.32 in 1925. (R. 234, 379, 381.) The rise in ground values is even greater than would be indicated by the augmented taxes, since it has been accompanied by the practically complete obliteration of building values. The original cost of the building was over $3,000,000. (R. 273.) When it was first separately assessed for purposes of taxation in 1907, its full value for taxing purposes was fixed at $1,600,000 (R. 379, 380), but in 1919 the taxing body agreed that the building had only a nominal value of $100,000 (R. 234), and it has been carried on the tax books at that figure ever since. (R. 234, 379.) The building adds nothing whatever to

the value of the property (R. 286), and the salvage would not pay for the cost of removing it. (R. 340.) It encumbers the site and is a liability rather than an asset. (R. 343.) One would rather have the land without the building on it because one would have to go to the expense of removing the present building. (R. 286.)

The Auditorium was constructed by the lessee; it was not something erected by the lessors and taken over by the lessee as part of the demised premises. The purpose of the building as disclosed by the leases, which prescribed only the general character and minimum cost of the building to be erected, was to provide security for payment of the ground rent. There is nothing in the leases about the dimensions of the building, nothing about the exterior design or interior arrangement; it might have been four stories high or twenty; all that the leases called for was "a substantial and solid fireproof building," with the specification of certain construction materials calculated to produce a building of that character. None of the leases prescribed how much of the area of the demised ground the building should occupy, or prevented the lessee from improving part of the ground and leaving the rest available for any lawful use. A modern steel skeleton structure would comply with every requirement of the leases in regard to materials and construction.

The present structure is not now a "substantial and solid fireproof building." In the language of the District Judge, "the Auditorium represents an obsolete type of construction." It is a massive building of very heavy stone masonry ten stories in height, with a heavy tower rising seven stories above the main structure. (R. 231.) The building consists of exterior bearing walls of heavy masonry from 2½ to 5 feet in thickness

(R. 291), which rest on floating foundations (R. 217, 290), with interior cast iron columns (R. 318), each of which rests on a separate floating foundation. (R. 217, 291.) The soil upon which the building stands is a soft clay which can be excavated with an ordinary shovel. (R. 290, 291.) For a full account of the foundations and substructure, reference is made to the testimony of Bernard H. Lichter, who put them in. (R. 290-294.) The massive tower near the southwest corner rests on a raft of timber and iron rail grillage 100 feet by 67 feet 2 inches (R. 217, 290-292), and a similar foundation spreading to a width of from 12 to 15 feet underlies the exterior walls. (R. 291.) There has resulted an extensive settlement in the structure, very unevenly distributed, as shown by the table of surveyor's levels (R. 221, Plffs. Ex. 38), taken at intervals almost every year since the beginning of the construction. (R. 214.) The levels in the table are those of 34 piers in the exterior walls, the location of which, as well as of certain interior stations, is shown on the photostat. (R. 215.) The table of levels, read from left to right, shows the extent of the settlement of each pier from time to time, varying from about 16½ inches at pier No. 1 to 27½ inches (R. 218) at pier No. 13 (instead of the 22 inches mentioned in the opinion of the District Judge). This settlement is still continuing (R. 218) as shown not only by this table of levels, but by the records of the surveyor employed by the owners of the Fine Arts Building adjoining the Auditorium on the north. The latter show, at a particular point in the north wall of the building (R. 225), a settlement between 1917 and 1918 amounting to ⅜ of an inch, which had increased by March, 1924, to 1¼ inches. (R. 229.) The architect in charge of the construction of the Auditorium made an allowance of only 2 inches for settlement. (R. 292.) Further excavations in the

vicinity would affect the foundations and increase the settlement (R. 321-5), and would be likely to produce a dangerous situation before there was time to meet it (R. 335) if it could be met at all.

The settlement of the exterior walls and tower has been very much greater than that of the interior columns (R. 339), and the unevenness of settlement has caused cracks in the structural parts of the building, and the fracture of various lugs and struts (R. 315, 320, 333, 339), and has induced numerous strains which are liable to create further trouble on short notice. Apart from visible fractures, the warping caused by settlement has put a twist in the cast iron and wrought iron skeleton, producing a hazard that defies any reliable solution, since there is no telling where the strain will go. (R. 344.) Investigation of the structural members, such as beams, girders, columns, etc., showed them to be overstressed through bearing a heavier load than their structural strength justified (R. 306), even if they were assumed to be of rolled steel. If of wrought iron the overstress would be much greater. (R. 306.) The load upon the soil at the wall footings is, in the opinion of qualified engineers, approximately 100 per cent more than what would be allowed by the building ordinances. (R. 312.) The overload and overstress is particularly dangerous because of the brittle character of cast iron columns and cast iron lugs. (R. 322.)

In the construction of a modern fireproof building the engineering formulas are based upon predetermined stresses and the strength of the material used, but such formulas were not complied with in the construction of the Auditorium, not having as yet been determined. (R. 319, 326.) Materials are now subjected to the most rigid tests in advance to determine their strength and carry-

ing power. (R. 325.) None of these methods were employed in the Auditorium, which was constructed just upon the eve of a revolution in the building art. (R. 319, 339, 347.) The Auditorium is a building of the old type, with exterior bearing walls supporting their own weight and that of the floors, whereas in the modern type of skeleton construction the walls are mere enclosures not bearing the weight. (R. 320.) Without attempting to abstract it, we specially ask the court's attention to the testimony of the architect, Charles E. Fox, on the character and history of the building, and the problems to which it has given rise. (R. 324 ff.)

There is no way of putting caisson foundations under the building with any assurance of success (R. 328, 340), chiefly because of the difficulty of carrying the present structure while the existing columns are taken out and the caissons are carried down to bed rock. (R. 321, 322.) In any such operation there would always be danger of collapse (R. 340), and if a breakdown started at some particular place it would be more dangerous than in case of a steel skeleton because cast iron is a very brittle metal and the parts are not securely tied together. (R. 322.) The difficulty in reconstructing the Auditorium is largely due to the original construction on floating foundations, with cast iron columns and lugs. (R. 339.)

The building contains a great deal of unprotected wood and uncovered iron and steel and is not what is now regarded as a fireproof structure. (R. 320.) Steel unprotected by fireproofing is more dangerous than wood (R. 345), and the structure is not strong enough to carry the additional load which fireproofing would entail. (R. 329.) The provisions of the building code about fireproofing apply to the remodeling or reconstruction of a building as well as to the erection of a new building when there is a change of occupancy. (R. 316-7.)

The Auditorium is also obsolete in its layout, largely because so much was sacrificed for the central theater (R. 231, 257, 286), which occupied so much interior space, and is so located, as to prevent the economic use of the surrounding space for office and hotel purposes. Upon the general demerits of the building reference is made especially to the testimony of the witnesses, R. F. Clinch (R. 231-3, 249-251), John Dorr Bradley (R. 286), and Charles E. Fox (R. 345, 351, 354-5). The results were unforeseen, but are inherent. The witnesses agree that no economic use of the space is possible; that the rooms are necessarily dark and badly arranged; that the elevators and plumbing system are out of date, and that it would be impossible to turn the building into a modern or paying investment even if it could be physically preserved.

The Association, during its entire history, has paid only one dividend of 1½ per cent. (R. 234.) Operating expenses are constantly on the increase. For a long time past the Association has saved many thousands of dollars per year through an advantageous heat, light, and power contract with the Congress Hotel (R. 234, 256), but this contract only ran to December 31, 1925, and could not be renewed except at a much higher figure. (R. 235, 256.) The reappraisal under the Studebaker leases in 1926 also entails a substantial increase in the rent. (R. 235.) No sinking fund has been set aside to meet the issue of outstanding bonds (R. 276), though required by the trust deed, except that an emergency fund of about $375,000 has been invested in securities (R. 244). A depreciation fund was set up on the books about 1919 but no money has ever been paid into it. (R. 275.) The value of the leaseholds is practically the only asset of the Association, except a little cash and furniture (R. 243, 256) and the emergency fund.

All the voluminous evidence introduced by the defendants was directed to relatively immaterial engineering questions, and did not even tend to qualify the District Judge's conclusion that the building was obsolete, financially unprofitable and prospectively unsafe and of the class of old buildings which are being torn down all over the central district of Chicago to make way for improvements of the character of the new building contemplated by the Chicago Auditorium Association. In a word, the plaintiff's case stands essentially uncontradicted on the facts, and the only questions remaining are questions of law about the right of the lessee, under the conditions shown, to the beneficial use of its property.

General Rights of a Lessee.

The ground leases involved in this proceeding were substantially alike. All were made in 1887, and ran for 99 years from August 1, 1886. Those now in controversy were afterwards extended to cover an entire term of 199 years, expiring August 1, 2085. The land was vacant, and the leases are outright grants of the use of the ground for that period. The granting clause in each of the leases is full and unrestricted. The ground is "demised and leased" to the Chicago Auditorium Association "to have and to hold the above described premises, with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine years." (R. 34, 51, 68.) The leases recite that they are made respectively "*in consideration of* the rents herein reserved and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns, to be kept, performed and fulfilled."

We postpone for the time being the discussion of these "covenants and agreements." It is sufficient to state here that they include no negative covenant prohibiting the substitution of a modern steel construction building for the present obsolete and unprofitable building. What we are now calling to the court's attention is that, except in so far as the "covenants and agreements" of the lessee do expressly or by necessary inference prohibit such substitution, there is no limitation on the lawful uses to which the lessee may put the property.

> "It would seem that on principle, apart from statute or express stipulation, the tenant is in no way restricted as regards his use of the premises, so long as this does not involve the commission of waste or the maintenance of a nuisance."
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> 1 Tiffany, Landlord and Tenant, p. 797.

> "When the lease was executed and delivered to defendant, and was silent as to the uses to which the lessee was to devote the lands, he had the right to use the lands for any lawful purpose he desired."
>
> *Gwinn* v. *Rogers*, 92 W. Va. 533, 115 S. E. 428.

> "By virtue of the right to exclusive occupation which a tenant acquires by his lease, he 'becomes entitled to use the premises in the same manner as the owner might have done, except that he must do no act to the injury of the inheritance.' Taylor, Landlord and Tenant, Sec. 172. This right may be limited or qualified by the terms of the lease, but it is not necessary for the tenant to show any particular provision of the instrument to justify his unlimited right of use and occupation, but the landlord who denies it must point out the covenant which expressly restricts the tenant's rights."
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> *Presby* v. *Benjamin*, 169 N. Y. 377, 62 N. E. 430.

The arena of controversy has shifted during the course of this litigation. In its earlier stages the lessors put forward as one of their major contentions the

proposition that every stone, brick and column erected on the demised premises became their property as a part of the real estate, and could by no means be removed without their consent, expressed in the lease or otherwise. They did not go so far as to contend that none of these materials of theirs could be removed in the process of repairs or minor alterations, and we doubt if they would now dispute the proposition that their property in the materials of the building is subject to whatever major rights the lessee enjoys under its leases. The length of the term for which these leases run, and the location and character of the property, necessarily imply that the lessee may meet the changing conditions, provided it does not impair the security for the rent. The ground at the time of the execution of these leases was at the edge of the central business district of a great and rapidly growing city, and is now in the very heart of that district. It was business property, suitable only for commercial use; and the parties contemplated that it would be used for the strictly commercial purposes of a hotel and office building and stores, which would financially supplement the Auditorium. It is inherent in the very nature of such leases that, so long as the security for the rent is not impaired, the lessee has authority to use the premises throughout the term for purposes that will yield a revenue and afford means for paying the rent, to say nothing of profit on the investment; and hence has authority to adapt the improvements placed on the ground to the varying conditions, especially to such radical changes as render existing improvements obsolete and unpaifitable and expectantly unsafe.

The Law of Waste.

The law of waste stood in the van of the arguments and briefs of the defendants in the District Court, but we doubt if much reliance is placed on it now, and we think it sufficient to recapitulate briefly a few of the main points and authorities on that subject.

Classical examples of waste in agricultural England were the conversion of arable land into meadow, a change in the character of the improvements, or even the erection of new improvements.

Darcy v. *Askwith*, Hob. 234.
Cole v. *Green*, 1 Lev. 309.

But afterwards it was held that there could be no waste without injury to the inheritance, and that where there was no real damage there could be no waste.

Harrow School v. *Alderton*, 2 B. & P. 86.
Jones v. *Chappell*, L. R. 20 Eq. 539.
Doherty v. *Allman*, L. R. 3 App. Cas. 709.

In any event, American courts have universally held that a strict application of the traditional English doctrines about waste was inadmissible in this country.

Pynchon v. *Stearns*, 11 Metc. 304.
Winship v. *Pitts*, 3 Paige 259.
Shine v. *Wilcox*, 1 Dev. & B. Eq. 631.
Sherrill v. *Connor*, 107 N. C. 630, 12 S. E. 588.
Moss Point Lumber Co. v. *Board*, 89 Miss. 448, 42 So. 290.

The law of waste has no relevancy to the present controversy, except as an aspect of the wider question of the use which a lessee has the right to make of the demised premises, and as this depends on the nature of the property and all the facts of the case, we proceed to

consider those questions in their larger bearings. The rights of a tenant are not deducible from an abstract definition of waste, but the existence of waste is an inverse function of the tenant's rights as determined by the circumstances of the leasing.

GROUND LEASES OF VACANT BUSINESS PROPERTY.

Lord Burlington's inheritance was not injured when his copyholder pulled down a ruinous barn, and his efforts to declare a forfeiture on the ground of waste were therefore unsuccessful.

Doe v. *Earl of Burlington*, 5 B. & Ad. 507.

If, however, a British duke let his ancestral hall to an American millionaire for five years, he would be entitled to receive the mansion at the end of the term substantially unaltered, and radical "improvements" in the building would not be excused by any proof that they had enhanced the market value of the estate. On the other hand, if the owner of a vacant lot on a business street in Chicago or New York should lease it for 999 years to a tenant who covenanted to erect on it a two-story or a ten-story building of a given value, we should not anticipate much difficulty in convincing a court that circumstances might warrant extensive changes in the character of the improvement even without the consent of a landlord who had repented of his bargain. The rights of a lessee in modern times are to be determined from all the circumstances of the leasing, and not by the application to a Chicago skyscraper of some maxim which grew out of farm leases in the days of Queen Elizabeth.

The plaintiff was confronted in the courts below by an imposing array of decisions in which even rather

trivial alterations were held to be a breach of the conditions of a lease. Most of these related to short leases of houses already built and could have no bearing upon the situation here involved. Even in the great case of *Doherty* v. *Allman,* L. R. 3 App. Cas. 709, the buildings were on the property when the lease was made. The question there decided was about the right of lessees under a lease for 999 years to convert into six dwelling houses a "store" which was on the premises at the beginning of the term, and which the lessees had covenanted to yield up in good order and repair at the end of the term. It was the lessor who appealed to equity in that case, and the court held that he was not entitled to an injunction to prevent the proposed replacement. A brief extract from the opinion of Lord Chancellor Cairns must suffice at this point:

> "The property demised, so far as it consisted of buildings, was in the form of stores, and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant—supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. * * * Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building, as it is proposed to be, has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not

almost as great an improvement as could be effected.

"If the evidence is to be believed, it is either the case now, or it may become the case, that the premises are absolutely untenantable—that no tenant can be obtained for them, or obtained for them at a rent which will produce the rent which the respondents have to pay. Repair, then, they must, for they are bound to do so by the covenant, and they have been called upon to do so. They must therefore lay out money in repairing something for which they cannot get, when it is done, an equivalent in the shape of a remunerative rent, and the court therefore for 900 years will be sentencing them, or those who succeed them, to keep the premises in a shape which will not enable them to get a remunerative rent; while, on the other hand, they would be bound to pay the substantial rent of £ 42 19s. a year to the landlord."

In an Illinois case, also, the improvements were on the land when the lease was made, but in view of their character and of the length of the term, it was held that the reconstruction of the building did not work a forfeiture of the lease.

"It can scarcely be seriously contended that it was expected that a building of the description of the one on the lots in 1874 should be maintained during the whole period of ninety-five years. In fact, the evidence shows that at the time the improvements were made thereon they were necessary to prevent its becoming unsafe as a residence and falling into decay. That injury or danger of loss to the lessor was occasioned by the change is not pretended. More than double the security which the lessor had in the old building was furnished by the improvements made on it."

Hawes v. *Favor*, 161 Ill. 440.

In America it has always been recognized that a lessee's rights must be shaped in accordance with the needs of a growing and changing society.

"The ancient doctrine of waste, if universally

> adopted in this country, would greatly impede the progress of improvement, without any compensating benefit. To be beneficial, therefore, the rules of law must be accommodated to the situation of the country, and the course of affairs here; as it has been frequently decided. * * * In this country, it is difficult to imagine any exception to the general rule of law, that no act of a tenant will amount to waste, unless it is or may be prejudicial to the inheritance, or to those entitled to the reversion or remainder."
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> *Pynchon* v. *Stearns*, 11 Metc. 304.

A long-term lease of vacant land in the central business district of a growing American city of necessity imports a right on the part of the lessee to adapt the improvements to the property from time to time as occasion arises. We do not know what the lessors might say now, but their position throughout the argument in the District Court was that they owned the ground, and therefore the building; that there was no language in the leases which could be construed as authorizing the removal of the building in order to permit the erection of another; and that in the absence of such affirmative language there is an inflexible rule of law, valid at all times and places and under all circumstances, which makes it impossible for a lessee to remove a building without committing waste and forfeiting his lease. Since this is a positive rule of law, not to be relaxed according to the dictates of any rule of reason, it would be equally inviolable if the lease had been for a thousand years, or if the region in which the present theatre and hotel building stands had become a purely manufacturing district, or if the structure were already physically unsafe and not susceptible of being made safe, or if it were for any other reason a detriment to neighboring property and the general welfare.

Since we are now dealing with abstract principles alleged to be of fixed and immutable character, it may be noted that plaintiff could not divest itself of its legal obligations by breaking the covenants of its leases. The right of forfeiture is optional with the lessors, and unless they choose to exercise the option the legal liability of the lessee remains. Were we permitted to take account of realities, it might be said that the lessors would have no motive for keeping alive the liability of a lessee whose assets had been reduced to nothing, since what the lessors want is to get their property back free of the leases, so that they can themselves remove the present building and erect another on their own account. Such speculations, however, can have no legitimate place in applying fixed rules of law which speak for themselves and must always prevail regardless of time, place or circumstance; hence, if the position of the lessors is sound, the Chicago Auditorium Association is legally bound to pay the stipulated rent for the next 157 years, and at the same time to maintain upon the premises during that entire period an obsolete and expectantly unsafe structure devoid of all revenue-producing capacity or value, and this in spite of the fact that the lessee not only has the right but is obligated by the covenants of its leases to maintain upon the premises "a substantial and solid fireproof building."

No case has been adduced by any of the parties precisely similar in its facts to this, involving a controversy between landlord and tenant about the right to renew or replace buildings erected by the lessee pursuant to the covenants of a modern ground lease, for a long term of years, of property in the central business district of a large and growing city, and where the replacement of an obsolete building by a modern and suitable improvement would enhance the security of the lessors and

could only be opposed by them for the purpose of capitalizing the nuisance value of the existing structure. The principles applicable to the present litigation are, however, recognized in many of the modern decisions about the rights of a tenant in possession, whether as between lessor and lessee, or as between life tenant and remainderman. Some of these principles are well stated in a case where a tenant under a five-year lease of an existing building was held to have no right to cut through a party wall, but where the court said:

> "If the owner of a dwelling in a neighborhood which is rapidly being converted from a dwelling region into a business region lets it to a party for a long term of years, knowing that he expects to use it for business purposes, that, by implication, is permission to him to make such alterations as are necessary and usual for that purpose. And so, where a demise is made for a great number of years—say, 100 or 200—for a fair rental value of the premises, there it must be presumed that the parties intended that the tenant for years should have well-nigh unrestricted use of the premises, provided he does not reduce their rental value; for in such a case the reversion, independent of the rent, is of mere nominal value."
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> *Klie* v. *Von Broock*, 56 N. J. Eq. 18, 37 Atl. 469.

Mention may be permitted at this point of the case of *Bass* v. *Metropolitan West Side Elevated Railroad Co.*, 82 Fed. 857, which was characterized by some of the counsel in the lower court as remarkably similar to the present case. There are superficial resemblances. The lease for ninety years required the lessee to erect a building to cost not less than $50,000, and, in case of destruction by fire, to restore it upon plans and specifications to be approved by the lessor. The railroad company found it necessary to cut off a corner of the building "and in order to accomplish that end without

resort to proceedings for condemnation," procured an assignment of the leasehold estate and removed part of the building without asking the lessor's leave. Upon a bill filed by the lessor it was held that the operation of the railroad should be enjoined unless within a reasonable time the company should acquire through condemnation proceedings the right to the property of the lessor which it had appropriated. The company was guilty of a flagrant attempt to evade payment of just compensation for private property taken for public use, and that was the sole question involved in the case. The building was not obsolete; the tenant had no justification, and claimed none, for removing the corner of the building; it was not removed for the purpose of replacing it with another building, but with railroad tracks which could by no possibility have been of value to the owner of the fee. The broad language of the opinion must be read in the light of the facts.

An opinion of Judge Winslow, afterwards the distinguished Chief Justice of Wisconsin, deserves to be read in full for its luminous exposition of the relative rights of a tenant in possession and a remainderman in respect of the adaptation of improvements to changing conditions. A brewing company acquired by purchase an estate *pur auter vie* in a Milwaukee lot improved with a handsome dwelling, which the company pulled down after it had become isolated and useless by reason of the grading down of the surrounding property for business purposes.

> "The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by

factories and railway tracks, absolutely undesirable as a residence, and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by, and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless? Certainly, all the analogies are to the contrary."

Judge Winslow carefully differentiates the case from one in which the lessee of an existing building covenants to surrender it at the close of the term in the condition in which he received it, and continues:

"This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under property instructions, or for the court where, as in the present case, the question is tried by the court."

Melms v. *Pabst Brewing Co.*, 104 Wis. 7, 79 N. W. 738.

There was a case of *Smyth* v. *Carter,* 18 Beav. 78, in which Lord Romilly enjoined a lessee from pulling down an old public house and replacing it with a brewery, and let fall the remark that a landlord's wish or caprice is not subject to question. In the leading English case in the House of Lords already referred to the opinion of Lord O'Hagan deals with the earlier decision, and, after premising that the remark referred to was casual, speaks thus of the distinctions upon which all such cases must depend:

> "The case has, I think, no application to the case before your Lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. *The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion, apply at all to the case before us.* But beyond all that, if the latter words of the *dictum,* that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord *absolute arbiter* of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my Lords, I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law." (Our italics.)
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> *Doherty* v. *Allman,* L. R. 3 App. Cas. 709.

In a federal case which arose at Cincinnati, the argument turned chiefly on the construction of a covenant about the replacement of improvements "in the same condition" as before the fire by which they had been burned. There was an old mansion on the premises when the lease was made. The right of a corporation which had purchased from the original lessee to replace

the house with a 10-story hotel was sustained by the Circuit Court of Appeals for these among other reasons:

> "The premises were in the heart of a large and growing city. Already in the near vicinity a larger and more massive style of buildings was being projected. It is incredible, without more evidence to go upon, that these parties intended or wished that for 100 years this spot should remain stationary, in order to furnish to the public the semblance of a family memorial. We can attribute no weight whatever to the suggestion."
>
> *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97.

The rights of a lessee depend on facts and not merely upon the abstract relation of landlord and tenant. The assignee of a ten-year lease of a building on Broadway in the City of New York, being unable to rent it as it stood, made extensive alterations so as to convert it into a hotel. The lessor brought an action for damages, but the trial judge took the case from the jury and rendered judgment for the defendant, which is reversed on the ground that the case should have been submitted to a jury as a question of fact:

> "Whether the acts which the defendants did really caused injury, or whether they were reasonably required for the enjoyment of the premises according to the business which they carried on, cannot be determined as a question of law, but is rather a matter of fact. It depends upon the character of the building, its position upon a principal street in the city of New York, the nature and requirements of the business of the defendants as carried on in that city, or of other business to which the building might be adapted, the extent of the alterations and their effect upon the property, whether permanent or transitory."
>
> *Agate* v. *Lowenbein*, 57 N. Y. 604.

Courts of equity have often refused to enforce legal rights when conditions have so changed as to render

such enforcement inequitable. Those cases, while differing in many of their facts from this, recognize certain fundamental principles which are by no means inapplicable.

In *Meux* v. *Cobley*, L. R. (1892) 2 Ch. 253, a lease of a vacant farm required the lessee to cultivate the farm in a good husbandlike manner according to the best rules of husbandry practiced in the neighborhood. The lessee converted part of the arable land into a market garden and erected greenhouses thereon. Kekewich, J., in holding that the covenant was not broken, said:

> "Nor can I with any reason exclude my own extrajudicial knowledge of the fact that this metropolis is growing, not only in houses and population, but growing, of course for that very reason, in its wants; that from year to year the demands on the land in the neighborhood of the metropolis are increasing, and that from year to year more ground must necessarily be converted into market gardens, or to other purposes, from which the inhabitants of the metropolis can be readily supplied."

Equity has found no difficulty in qualifying a trust which, by reason of unanticipated developments, has become impracticable of execution without grave detriment to the property.

Curtiss v. *Brown*, 29 Ill. 201.
Denegre v. *Walker*, 214 Ill. 113.
Cary v. *Cary*, 309 Ill. 330.
Marsh v. *Reed*, 184 Ill. 263.
Packard v. *Illinois Trust and Savings Bank*, 261 Ill. 450.

In *American Coal Company* v. *Indiana Cotton Mills*, 78 Ind. App. 115, 134 N. E. 891, land was conveyed in consideration of the erection of a factory and subject to a restrictive covenant requiring a certain area to be left

open. An injunction against building on this area was refused, the court saying:

> "The deed containing the covenant here involved was executed in February, 1849, and it is not claimed that there was any attempted violation of such covenant until in July, 1918, a period of more than 69 years, during which time history records the wonderful growth of the country, change in commercial conditions, and the phenomenal increase of industrial and manufacturing enterprises. To hold, in view of this development, that the parties to the deed intended after these years to hamper the cotton mill to its original installation, is to hold that they were wholly without vision."

In a great many cases the courts have refused to enjoin the breach of restrictive covenants which have become obsolete by reason of changes in the environment and the enhancement of values incident to the normal march of progress.

Windemere Improvement Association v. *American State Bank,* 205 Mich. 539, 172 N. W. 29.

McClure v. *Leaycraft,* 183 N. Y. 36, 75 N. E. 961.

Batchelor v. *Hinkle,* 210 N. Y. 243, 104 N. E. 629.

Page v. *Murray,* 46 N. J. Eq. 325, 19 Atl. 11.

The Massachusetts case of *McArthur* v. *Hood Rubber Co.* 221 Mass. 372, 109 N. E. 162, established, in that state at least, that a restriction which has become completely obsolete ceases to exist at all. Earlier decisions in which attempts were made to enforce the restriction affirmatively found it easier to treat the question as one of remedy, but when the issue was fairly presented the court adopted what has been called "the more logical view that when the object of a restrictive covenant can no longer be obtained, the restriction ceases to exist." (29 Harv. Law Rev. 107.)

In the recent case of *Gilmore* v. *Keogh,* 241 Ill. App. 28, a decree was affirmed which removed as a cloud on title a restrictive covenant that had become obsolete by the growth of the city converting residential into business property.

Covenants of the Leases.

There was no building on the present Auditorium site at the commencement of the time of these leases, and hence no obligation, such as is mentioned in many of the cases, to return any building *in the condition in which it was when received,* but the contention of the defendants has been that plaintiff is required, by the express or implied terms of its leases, to erect a building and surrender that identical building at the end of the term *in the condition in which it was when completed.*

The covenants of the five leases are substantially alike, and one (R. 34) will serve for all. It seems unnecessary to repeat them in detail. No negative covenant will be found forbidding the replacement of the building, and no affirmative covenant, we confidently assert, from which any such negative covenant can be implied.

1. *Covenants to Be Construed as Security for the Rent.*

In the first place, the covenants about the building must be interpreted in the light of the purpose for which they were made, which was security for payment of the rent. Ground leases of business property are a familiar and recognized form of conservative investment. The leases involved in the present controversy specified the value of the land, fixed the annual rent at a certain percentage thereof subject to subsequent revaluations, and required the lessee to erect a building of a stated minimum cost and keep it in repair. Taxes, assessments, in-

surance premiums and some other charges were to be paid by the lessee, so that the rent would yield a net percentage on the ground values, and there was given to the lessor by each lease "a valid and first lien upon the leasehold interest," and also upon "any and all buildings, improvements, and other property on said premises belonging to" the lessee "*as security for the payment of said rent.*" (R. 42.) If the lessors had themselves erected the building, they might conceivably claim, though we think ineffectually, to have some legitimate interest in it other than as security for their investment, but in view of the provisions of the leases and the circumstances surrounding their execution, nothing is involved except an investment with certain provisions for safeguarding the security. The only suggestion in the entire record of any different motives is in a question volunteered by Judge Wilkerson, who asked Mr. Clinch, president of plaintiff, whether Mr. Willing, in the negotiations prior to the bringing of suit, said anything about wanting a monument to the city to stand, or put his opposition to the removal of the building on any ground of public interest. Mr. Clinch answered, "Absolutely not." (R. 254.) The judge asked Mr. Clinch to state as fully as he could the reasons given by Mr. Willing for his position that the old building could not be torn down and a new one put up in its place. Mr. Clinch said he told Mr. Willing

> "that we thought we should be allowed to put up a better building and they would have a better security by having a building there with caissons, a twenty-two story building, rather than the building we have got there, and he said, 'Well, if you do, we think we should get more rent.' I said, 'Well, you made your bargain there for rent. You agreed to lease it for so much. You leased it to us for 199 years and we will continue to pay you rent, and during the interval we will furnish you with any se-

curity any court says is fair and right, until the new building is up, and then you have got better security.' He said, 'Well, that is all right, but if you get more money out of it we think we are entitled to more rent, and you put up that building and you have got to agree with us before you take that building down. It takes two to make a bargain.' "

We note in passing that this offer and rejection of security was evidently overlooked by counsel for the petitioners when they assert in their brief (p. 9) that

"in none of the conferences did President Clinch mention the giving of security to protect the landlords during the proposed periods of demolition of the present building, and of the construction of his projected new one."

In the Cincinnati case already cited the lease contained a covenant on the part of the lessee that if improvements, repairs, or changes were made on the property the old improvements should be replaced by new ones of equal value and fully as substantial. This clause was analogous to the covenants in the Auditorium leases respecting the erection of a substantial and solid fireproof building of a certain cost. The following language of the court indicates the purpose of such covenants:

"Now, without going further, we think it clear that the main object of these stipulations concerning demolition, repairs, and reconstructions was to maintain constantly the security for rent and the restoration of the property in an unimpaired condition at the end of the lease. They were dealing with the security of values. A stipulation that this insurance money should only be used to replace the old by the same kind of buildings would be inconsistent with the dominating provision that, if the lessee should replace old improvements by new, the latter should be of equal value and fully as substantial as the old. And the rule in such conditions is that all parts of the instrument shall be so read as to harmonize with each other."

Pike v. *Cincinnati Realty Co.* 179 Fed. 97.

In *Hawes* v. *Favor,* 161 Ill. 440, where a complainant in equity was held not to have forfeited her 95-year lease by reconstructing and adding to an old house on the premises, one persuasive reason given by the court for its decision was stated as follows:

> "The manifest object of the parties in putting these covenants in the lease was to protect the lessor against loss resulting from permitting the property to go into decay or to be removed from the premises. * * * That injury or danger of loss to the lessor was occasioned by the change is not pretended. More than double the security which the lessor had in the old building was furnished by the improvements made on it."

It is obvious from these principles, and from common knowledge, that any provisions of the leases with respect to the improvements to be erected or maintained on the land must be interpreted in the light of the primary purpose of affording adequate security for payment of the rent.

Judge Wilkerson's curiosity on this point (R., 253-5) was due to covert suggestions, made at the trial and still hinted in the present brief, that the Auditorium was a public monument built without expectation of pecuniary profit. Investors were no doubt attracted by the plan to furnish a large assembly hall which would be a credit to the city, but plaintiff was organized under the Illinois statute as a corporation for pecuniary profit, and the investors no doubt hoped that the enterprise would be a financial success. Whatever motives may have animated the promoters whose funds went to enable the lessee to erect the building, it is at least clear from the present record that the original lessors, to whose rights alone the defendants have succeeded, made no financial sacrifices whatever. The evidence is undisputed that the valuations placed on the land in the Peck and Walker leases

as a basis for figuring the initial rent were above rather than below the market. (R. 287.) In fact, both fees were very shortly afterwards sold at a substantial profit, as appears from the statement of facts at the beginning of this brief, to which we refer.

The agreed value of the Walker fee upon which the rent was computed in 1887 was $420,000, and this fee was sold March 17, 1890, to Henry J. Willing for $475,000. The agreed valuation of the Peck fee was $193,500, and this fee was sold February 2, 1889, for $232,000. Any notion that these purchasers, either in buying the property or in extending the leases, were actuated by altruistic motives is as gratuitous as it is fantastic. There is no indication that Henry J. Willing ever regarded his purchase otherwise than as an investment, and the evidence above cited shows affirmatively that this is the only aspect of the property in which his son Mark Skinner Willing is interested. When the Walker leases were extended by Henry J. Willing the annual rent then payable thereunder until the year 1896 was $21,000, after which the amount was uncertain, depending on the valuation to be made in that year. The Peck fee was purchased by a Boston trustee and a Connecticut investor, and anyone who affirms that these New England gentlemen came to Chicago to modify their lease out of a philanthropic regard for that metropolis is assuming a heavy burden of proof. The annual rent then payable to them until 1896 was $11,610, and instead of an uncertain sum to be determined in that year and thereafter by a revaluation, they also accepted a certainty of $14,000 for the remainder of the term. Both lessors evidently believed that they were improving their immediate position and converting speculative possibilities into commercial certainties.

If any of the stockholders had the good of the city at heart, as no doubt many did, we do not find them or their successors asking to have an obsolete building perpetuated at their expense. If anybody was actuated by public spirit to the exclusion of commercial motives, it was not the original lessors, nor their present successors in interest, nor yet any intervening owners of the fee, and we are not advised how the present owners of the fee expect their vicarious patriotism to redound to the benefit of the original investors or their successors.

The suggestion on page 6 of petitioners' brief that "newcomers unconcerned with the civic aspirations which fostered the Auditorium enterprise have recently acquired control of its capital stock," is not based upon the record. The references are to the cross examination of Mr. Clinch at pages 245 and 259. He testified that he had acquired approximately 1,800 shares of the capital stock (out of a total of 20,000), but denied that he controlled other shares or that there was any syndicate in which he had a part or any trust agreement or voting trust. His only control over any other stock rested upon the confidence of the majority of the stockholders which he enjoyed as president of the corporation.

2. *Covenants to Be Construed in Accordance with Public Policy.*

If any covenants in these leases ineluctably imported an agreement that this building on commercial property must be maintained as originally built, no matter how obsolete, ruinous, dangerous and unprofitable, and no matter how alien to its environment, for approximately two hundred years, we think that, as so interpreted, they would be contrary to public policy and void. Public policy as a ground for nullifying a covenant alto-

gether is undoubtedly an argument of last resort, but it enters constantly into the determination of the just and true meaning of covenants. There are, however, many familiar instances in which the courts have, from considerations of public policy, overruled the intentions of the parties, however explicitly insisted upon in their contract. Often the principles thus established are so familiar that their origin is apt to be overlooked.

A conveyance, no matter how absolute in form, will be construed as a mortgage when actually given to secure a debt, and every device of the parties to exclude or clog the equity of redemption is absolutely void.

Peugh v. *Davis,* 96 U. S. 332.
Brick v. *Brick,* 98 U. S. 514.

A stipulation in a contract relieving a carrier from liability for his own negligence is contrary to public policy and void.

New York Central R. R. Co. v. *Lockwood,* 17 Wall. 357.
B. & O. R. Co. v. *Voigt,* 176 U. S. 514.

Agreements in restraint of trade are frequently held void because against public policy.

3 Williston on Contracts, Secs. 1638, 1639.
Gibbs v. *Consolidated Gas Co.,* 130 U. S. 396, 409.
Fowle v. *Park,* 131 U. S. 88, 96.
Dr. Miles Medical Co. v. *Park,* 220 U. S. 373, 406.

Restraints upon the alienation of property conveyed in fee are rejected by some courts altogether on the view that *any* restriction is repugnant to the grant, but by other courts only when unreasonable and contrary to public policy.

Gray v. *Blanchard,* 8 Pick. 284.
Cowell v. *Colorado Springs Co.* 100 U. S. 55.

Where the latter rule prevails, a restraint upon alienation during the life of the grantee of the fee is held to be unreasonable and void.

Pritchard v. *Bailey,* 113 N. C. 525, 18 S. E. 668.
Harkness v. *Lisle,* 132 Ky. 767, 117 S. W. 264.
Cropper v. *Bowles,* 150 Ky. 393, 150 S. W. 380.
O'Connor v. *Thetford,* 174 S. W. (Tex.) 680.

If sound public policy will not permit the fee title to be tied up for the remainder of one person's life, no reason is apparent why it should permit all beneficial use of the property to be destroyed for many generations by an agreement which can be of no legitimate advantage to anybody. If the language of these leases was so specific as to be susceptible of no other interpretation than that contended for on behalf of the lessors, we think the leases would to that extent be so contrary to sound public policy as to be void under the authority and persuasive reasoning of the great case of *Egerton* v. *Brownlow,* 4 H. L. Cas. 1, universally accepted as establishing those limitations which must be imposed in the public interest upon the right of private contract and the use of private property. It is no radical or revolutionary doctrine which this leading decision, pronounced in the year 1853, has established in Anglo-Saxon jurisprudence. Space is lacking for extended quotation from the opinions of the several Lord Justices, but we invite special attention to some of the language of the Lord Chief Baron on page 144, of Lord Lyndhurst on page 160, and of Lord Truro on page 197 of the official report of the case.

Public policy is a living principle, which, while its operation upon situations of frequent recurrence has been standardized by settled rules, cannot be restricted

to cases where an exact precedent is to be found in the books.

> "It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding."
>
> *Pope Mfg. Company* v. *Gormully*, 144 U. S. 224, 233.

Whether a restraint on the use of property is consistent with public policy depends on the standards of the time and not upon those of past ages. We have to deal with a great and growing city, not with a static community; with Chicago, and not with an English countryside. What was lawful a hundred years ago may be contrary to policy of the present day.

The foregoing decisions with respect to agreements held to be against public policy and therefore void are not adduced with the idea that these leases do contain covenants which require the lessee to maintain for the next 150 years an obsolete, financially impossible and prospectively unsafe building; but that in view of the illegality on grounds of public policy of any such covenants had they been written into the leases, this court will not now read them into the leases by implication from the ordinary covenants for maintenance and repair.

3. *Covenants to Be Construed in Accordance with Reason and Justice.*

The parties to a contract or other written instrument will not be deemed to have been actuated by absurd or unlawful intentions unless those intentions are set forth in unequivocal language. Doubtful phraseology will be interpreted in the light of the conditions and circumstances under which a contract was made, and with due regard to the reasonable and lawful objects which honest men are presumed to have had in view.

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract."
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> *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota,* 121 Fed. 609, 611.
>
> *A. Leschen & Sons Rope Co.* v. *Mayflower Co.,* 173 Fed. 855, 857.

The foregoing language was used in both of those cases by Mr. Justice Sanborn, who also said in a later case:

> "Where the language of a contract is contradictory, obscure, or ambiguous, or its meaning is doubtful, so that the agreement is fairly susceptible of two constructions, the more natural, probable, and reasonable interpretation should be adopted."
>
> *Barnsdall Oil Co.* v. *Leahy,* 195 Fed. 731, 734.

> "It is a rule of interpretation that where a contract is open to two constructions, by one of which

it would be lawful and the other unlawful, the former must be adopted."

Hobbs v. *McLean,* 117 U. S. 567, 576.

"When an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

Per Field, J., in *Noonan* v. *Bradley,* 9 Wall. 394, 407 (citing 6 M. & W. 612).

Courts, in the construction of written instruments, look to the subject matter, the surrounding circumstances, the situation of the parties, and the objects to be attained, and are not limited to a mechanical examination of the four corners of the instrument.

Nash v. *Towne,* 5 Wall. 689.

Merriam v. *United States,* 107 U. S. 437.

Merrill-Ruckgaber Co. v. *United States,* 241 U. S. 387.

The terms of a grant or lease are to be construed in favor of the grantee or lessee, especially as against any restrictions upon that free use of property which is safeguarded by the settled public policy of this country.

Peirce v. *New York Dock Co.* 265 Fed. 148, 155.

Hawes v. *Favor,* 161 Ill. 440.

Negative covenants restricting the free use of property will not be implied, but every intendment is against such limitations.

Hutchinson v. *Ulrich,* 145 Ill. 336, 342.

Van Duyn v. *Chase,* 149 Iowa, 222, 128 N. W. 300.

In *Doherty* v. *Allman,* L. R. 3 App. Cas. 709, the Lord Chancellor said:

"Your Lordships will observe that the contract

is an affirmative one. There are no negative terms in it. There are no terms obliging the lessee negatively by way of contract not to use these premises for any purpose but stores, and not to make any alteration which would render them suitable for any purpose but that of storing corn or for goods of the same kind."

4. *Implication from Affirmative Provisions of Leases.*

Manifestly, these leases are not to be treated as functioning *in vacuo,* but must be viewed in their relations to the circumstances existing when they were executed. They contemplate and expressly provide for the construction of a "substantial and solid fireproof building" of a minimum cost, and with a general specification of certain fireproof materials—no more. The building was on the edge of the central business district of a great and growing city, subject to the radical changes characteristic of such property, and there are *no negative covenants* or provisions in the leases to divest the lessee of such free control over the property and its uses as would alone justify the obligation to pay the stipulated rental for the ground. The lessors were and are entitled to have the payment of this ground rental assured to them throughout the term of the leases by a "substantial and solid fireproof building" on the premises. Conversely, the lessee is entitled to have the benefit of such a building. While reluctant to wring subtle meanings out of words which were perhaps used rather artlessly, we proceed to draw such inferences from the phraseology of the leases as a comparison of their provisions will fairly yield.

The lessee is required to erect a building, and to pay a ground rental based on the value of "the demised premises exclusive of improvements placed thereon by said lessee, *its successors or assigns.*" Some improve-

ments to be erected in future by successors or assigns of the lessee are in contemplation of the parties. Again, there is throughout an indiscriminate and interchangeable use of the words "building" and "buildings," coupled with "improvements," and at the end of the term there is to be an appraisal of "any and all *building* or *buildings* and any and all *improvements* that are *then* situated and standing upon said premises." We do not imagine for a moment that the parties to these leases weighed every word to discover what remote meanings it might be susceptible of; what we do claim is that if the lessors undertake by a process of verbal analysis and forced implication to extract from covenants to repair and other language of the leases a meaning that would defeat the ends of obvious justice, we are at least equally entitled to draw any inferences which point to an opposite conclusion. In doing so we shall not lack authoritative sanction. In long-term leases where it would be oppressive and unconscionable to require obsolete buildings to be maintained for generations, the courts have been astute to discover, even in the language of the lease itself, the permission to do what is obviously demanded by reason and good conscience.

In *Meux* v. *Cobley*, L. R. (1892) 2 Ch. 253, where the lessee was charged with wasting the inheritance by changing the character of the premises and placing new structures thereon, Kekewich, J., delivering the opinion, said on page 260:

> "I would refer to one other provision, which is, that the lessee is bound at the end of the term to yield up in good condition, not only the buildings which he was bound by prior covenant to keep in repair, but also all fixtures, improvements, and things which were then or at any time during the term should or might be fixed to or erected or set up upon any part of the demised premises. So that

> the lease contemplates there being additions in the way of fixtures which might be also improvements, and which are to be delivered up."

In *Doe* v. *Jones*, 4 B. & Ad. 126, where the tenant converted part of a dwelling into a shop and made other changes in premises leased for 40 years, the lessee had covenanted to repair and keep in repair the demised premises, "together with such buildings, improvements and additions whatsoever as at any time during the said term should be erected, set up, or made by him." Counsel for the landlord argued that "the parties cannot have contemplated as an improvement the doing of acts which the law considers waste," but Parke, J., said:

> "That does not apply to a lease like this, which contemplated 'improvements and additions' and only provides against nonrepair, which is permissive waste. Under such a lease can it be said that a valuable house was to be kept in precisely the same condition for forty years? I think the nonsuit was right."

Taunton, J., added:

> "This case is the same as if there had been an express contract for the liberty to make improvements, which at common law would have been waste: here the contract is implied."

In *Jones* v. *Chappell*, L. R. 20 Eq. 539, Sir George Jessel expressed the opinion that a covenant to keep all future buildings and erections in repair was "almost an implied license to erect buildings."

In *Doherty* v. *Allman*, L. R. 3 App. Cas. 709, there was a covenant to keep all buildings and improvements in good repair and condition, and Lord Chancellor Cairns, after referring, in the discursive manner which seems to prevail in the House of Lords, to the length of the terms and the character of the improvements, said in conclusion:

> "I should be sorry to say that, in a lease for such

> a term as this, the construction to be given to a covenant of this kind might not be held to be such as that the conversion of the storehouse under the circumstances into dwelling houses would be or might be an 'improvement' within the meaning of that term."

It is not our contention that these cases are exactly like the one at bar, but the same underlying principles of interpretation are applicable. In each of the Auditorium leases there is a covenant by the lessee to pay taxes on the premises, "or upon any building, addition or improvement of any kind which may after the date of these presents and before the expiration of the term of this lease be erected, made or placed thereon," and there are other provisions about the buildings or improvements on the premises at the end of the term. These might not be sufficient to dispense with the terms of a negative covenant restricting the replacement of old buildings, had any such covenant been incorporated in the leases, and provided it could be reconciled with public policy; but they are such as could not have been used if the parties had intended to restrict the lessee in the legitimate use and enjoyment of its leasehold estate.

5. *Alleged Effect of Covenants to Repair and Rebuild.*

Stress was laid in the District Court on two provisions of the leases, one general and the other special. In the first place, each lease requires the lessee to "keep the buildings situated upon said demised premises and all appurtenances belonging thereto in good repair and in a safe and secure condition," and to "keep all rooms in said building in good, safe, clean and tenantable condition and repair during the entire term of this lease." That is a general provision. Then there is a special requirement that if "said buildings" or any part thereof

be destroyed or damaged by fire, the lessee shall rebuild or repair the same "upon the same plan as before the fire happened, or such other plans as by the party of the first part shall be approved in writing." These are the only covenants about repairing or rebuilding.

The special covenant about rebuilding refers to nothing that has occurred. There has been no fire. It was invoked for the sole purpose of placing by inference or innuendo an unreasonable and inequitable construction upon other portions of the lease to which it has no literal application whatsoever. In view of the principles to which courts resort in ascertaining the true meaning of contracts, this clause might well be passed without further notice, but we do not think that even if the question were of rebuilding after a fire it would bear the construction contended for. The argument was, that rebuilding on the "same plan" meant rebuilding in accordance with the identical plans and specifications originally used. The ordinary phrase employed in contracts to express that meaning is "plans and specifications." The only "plan" found in the leases is that of a substantial and solid fireproof building, constructed of brick, etc., and "such other materials as are usual in fireproof buildings." So far as these leases disclose, the lessors were not at all concerned with exterior elevations or interior layout, with height, or breadth, or depth,—only with minimum cost and substantial construction. Any building which complied with the original specifications would satisfy the requirements with respect to rebuilding after a fire.

> "In support of the position taken by the trustee, his counsel point to and chiefly rely upon the final stipulation in the foregoing paragraph, wherein it is provided that if any insurance money should be collected, it 'shall be applied to replace said improvements upon said property in the same condi-

> tion as before said damage occurred'; and they say that 'the same condition' means the same forms of buildings and structures as before the fire. We do not so interpret this language. It seems to us to refer to the state, quality, or predicament of the buildings, etc., rather than to the structures themselves. This construction harmonizes with the other stipulations of the contract, while the other can only with difficulty be reconciled with them."
>
> *Pike* v. *Cincinnati Realty Co.* 179 Fed. 97.

We think that the meaning we ascribe to the phrase "same plan" in the Auditorium leases "harmonizes with the other stipulations in the contract" about the kind of building to be erected on the premises, and also with common sense and common honesty, and that it is the only meaning which does; but even if the clause had in unambiguous terms required the exact duplication of any building destroyed by fire, it could not determine the lessee's rights when there has been no fire.

The other covenant, to keep the buildings and appurtenances "in good repair and in a safe and secure condition," occasioned much debate and difference of opinion in the court below, but unless our recollection is inaccurate, counsel for the different defendants all did reach the conclusion, by whatever devious routes, that the covenant to keep the buildings in good repair and in a safe and secure condition included a covenant on the part of the lessee never to pull down the Auditorium for any purpose or under any conditions, and that this implied negative covenant was as absolute as any proposition of Euclid. This argument requires such a construction to be put upon the words "repair" and "maintain" as would spell out of them a covenant, affirmative in form but negative in effect, forbidding the erection of any new building upon these premises, even though the present building should have become, not only worth-

less, but dangerous and incapable of being held together by any process of repair. The argument not only demands this judicial construction, but means that *one* building and only *one* building may be built upon the premises, and that this one building must be repaired and maintained until the end of the leases unless it is burned down; and even in case of fire the contention is that this one building must be replaced by another one building exactly on the same architectural plans and specifications, unless, and unless only, the lessors approve in writing other plans for this one building. Each lease repeatedly and indiscriminately refers not to the *one* building insisted upon by appellees, but to buildings and improvements on the premises demised by *that* lease, with no reference to leases of adjacent lots. With language like this in the leases, could any chancellor, seeking to construe them as a whole according to the reasonable intentions presumed to have been in the minds of the parties, adopt a construction imposing upon the use of valuable property unreasonable and unjust limitations, profitable to nobody unless as an instrument of exaction, but damaging to the lessee, the neighborhood and the community, and contrary to the plain dictates of public policy?

Witnesses may differ about the physical possibility of retaining the outer shell of heavy mason work by inserting caisson foundations underneath and reconstructing the interior; but about the worthlessness of such a reconstructed building as a source of income there is no difference of opinion at all. What the lessee undertook to erect was a substantial and solid fireproof building. What it covenanted to keep in good repair and in a safe and secure condition was, in the case of each separate lease, "the building situated upon said demised premises." Owing to unforeseen contingencies it is now un-

able to keep the present building in good repair and in a safe and secure condition as a solid and substantial fireproof building or otherwise. It does not clearly appear just what the petitioners now claim as to the lessee's right to make the building comply with the covenants of the leases through alterations of the most radical character, provided a semblance of identiy is preserved by retention of the outer masonry shell. But any sacrifice of the formal tokens of identity while a new improvement is being constructed conforming beyond all question to the strictest requirements of the leases, is, according to the version urged in the court below, by no means to be tolerated, and this though no *express* negative covenant prohibits the substitution of a new "substantial and solid fireproof building" for one which has ceased to be substantial and solid. If, as plaintiff's witnesses say, it is physically impossible to make this building solid and substantial by the expenditure of any amount of money, the triumphant retort was that impossibility affords no excuse for failure to perform an express covenant; that if plaintiff has agreed to keep this same building in good repair, and if this same building can no longer be kept by it in repair, the misfortune is its own and it cannot evade the consequences by erecting another building which would meet every requirement of the leases.

Conditions and Form of Relief.

In the District Court, the plaintiff was charged with having damned its own case by offering to do equity, and this view even prevailed with Judge Wilkerson, as is evident from the following language which he used at the conclusion of his opinion (R. 562):

> "The offer to give bond for the construction of the new building, and the offer to reform the provisions

> of the leases with reference to purchase of the building at the expiration of the terms, do not aid the plaintiff. Rather they emphasize the fundamental infirmity in its appeal for equitable relief. If plaintiff is right in its construction of the leases, it is entitled to tear down the old building and to put up a new one, without giving bond and without submitting to a modification of the leases. If plaintiff's contention is wrong, a court of equity cannot relieve against the obligations of the contracts, in the absence of some element of fraud, accident, or mistake. Equity does not have power to make contracts for the parties which they have not made for themselves."

This view implies that every right of parties to a lease must be found expressed in its terms, and that the right of plaintiff to rebuild, if it exists at all, must be spelled out of some affirmative language of the leases now in question. We think we have abundantly shown the unsoundness of this interpretation of the rights of parties. The extent of a lessee's right to improve the demised property or to alter the improvements thereon from time to time is determined by the condition of the premises at the time of leasing, the length of the term, the nature of the property and all the surrounding circumstances, unless that right is defined by the lease itself. If these leases in terms gave the lessee the right to replace the first building with a new one but were silent about interim security, and if the building on the premises was the principal security for the rent, we think we should find the lessors insisting, in court or out, upon some protection before their main security was destroyed. Whether they would be entitled to such relief is not a question now in issue. The right of a lessee to use and improve the demised property depends on a variety of facts, chief of which is the effect which such improvement would have upon the lessors' security. The right might not exist if its exercise would necessarily impair

the security for payment of the rent, and it might not be exercisable except upon conditions which would effectually prevent such impairment. Plaintiff certainly did not prejudice its case by anticipating any possible apprehensions of the defendants or by offering to do whatever is just and equitable in the premises. If the court shall deem the defendants entitled to any security, the plaintiff has offered to furnish it, as was done in *Hyman* v. *Rose*, L. R. (1912) App. Cas. 623, and the court will be at liberty to accept the offer "without too curiously inquiring," as Lord Chancellor Loreburn said in that case (p. 632) "whether the offer is in excess of what the court would exact."

The other criticism of plaintiff's offer to do equity relates to the purchase by the lessors of the improvements at the end of the term, as provided in each of the leases. (R. 45.) The lessors protest that they cannot be forced to pay for a building more costly than the original structure now standing on the premises, but they are scandalized by plaintiff's suggestion of releasing them from any such obligation. The leases do not limit the cost, but the contention was that the lessors knew what kind of a building was going to be put up and covenanted with respect to it only. Counsel did not say whether plaintiff could have increased or could now increase the height of the building by the erection of additional stories. It is to be noted, with reference to the purchase price at the end of the term, that each of the Walker leases contains the following provision (R. 45, 62):

> "In making said appraisement of the value of said improvements, the appraisers or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said im-

> provements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant."

The same requirement in substance appears in the Peck lease (R. 82) and the Studebaker leases. (R. 101.) If it is in fact a vested right of the lessors to have on the premises at the end of the terms a ruin which will cost them nothing because its appraised value will be nothing, the plaintiff is prepared and has offered to go just as far in allaying their misgivings as the court may think equitable. Even if this process did import a modification of the leases by waiver of an obligation of the lessors, that fact would present no obstacle to equitable relief.

> "It is within the powers of a court of equity to refuse to direct the specific performance of a contract unless the complainant will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."
>
> 25 R. C. L. 344.

The necessary implication is, that if plaintiff offers to waive a provision of the contract which, if strictly enforced, is claimed to work injustice, the court can decree specific performance of the agreement as so modified, as it could impose a like condition if no such offer were made; in other words, the argument that to grant this relief would be to make a new contract for the parties is merely specious and unsound.

In *Davis* v. *Hone* 2 Sch. & Lef. 340, Lord Redesdale expressed himself as follows:

> "The court ought not, I think, to give specific performance according to the letter of the covenant, for that would be unconscientious against the defendant, in consequence of the change of circumstances.

> But because the plaintiffs ought not to have the covenant performed literally, they are not to lose their property entirely. This court will execute the covenant, according to a conscientious modification of it, to do justice as far as circumstances will permit. It has happened, by lapse of time and change of circumstances, that it would be harsh and unjust to require execution of the covenant, specifically in the very terms; but it is the advantage of a court of equity that it can modify the demands of parties according to justice."

It is a recognized and regular practice of courts of equity to grant affirmative relief upon equitable terms even to the extent of enforcing a contract with some mitigation of its literal provisions. For instance, in the case of *Willard* v. *Tayloe,* 8 Wall. 557, this court said:

> "It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis* v. *Hone,* 2 Sch. & Lef. 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party."

And in the earlier case of *Mechanic's Bank* v. *Lynn,* 1 Pet. 376:

> "The court ought not to decree performance according to the letter when, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The court may so modify the agreement as to do justice so far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires."

In *City of La Follette* v. *La Follette Water Company,* 252 Fed. 762, Judge (now Mr. Justice) Sanford, in an opinion adopted by the Circuit Court of Appeals, said:

> "In cases where hardship develops in the enforce-

ment of the contract due to changed conditions, the court may properly, as a condition of granting to the plaintiff the equitable relief of specific performance, require it to assent to such equitable modifications of the contract as are just and proper."

Other federal cases announce the same principles.

Wright v. *Vocalion Organ Co.* 148 Fed. 209.

Cronen v. *Moore,* 210 Fed. 239.

Prof. Roscoe Pound, commenting on this feature of the case, says:

"In such a decree as that in *City of LaFollette* v. *LaFollette Water Co.* where Judge Sanford made the plaintiff accept certain modifications of the contract as a condition of specific performance, we are on surer ground. If the plaintiff will not consent, he may have his remedy at law on the contract as made. If he desires equitable relief, he may be required to do equity by accepting reasonable modifications in view of supervening events which would make performance according to the unmodified terms a hardship. These cases are significant of a return to the classical conception of the chancellor's powers and the manner of their exercise, and are in welcome contrast to the inflexible mechanical methods of a generation ago, which then seemed to import a decadence of equity."

33 Harvard Law Review, 437.

If plaintiff went farther than was necessary in conditioning its prayer for relief upon the giving of security for completion of a new building, the relief to which it may have been entitled without bond would certainly not be denied with a bond. As to payment for the building at the end of the term, it has not expressed and would not be justified at the present time in expressing an opinion on the question whether any waiver of the provisions in the leases is necessary or equitable. That would be for the court to decide, either now or when the question is presented for determination in the proper forum.

The lessee can never hope to recoup one-half of its losses even if it should not be required to waive any of its existing rights under its leases.

Counsel for certain of the defendants cited authorities in the court below from which they argued that any decree in this cause would impose on the court administrative duties for an indefinite period. Nothing in the present case resembles the conditions under which, in the cases so quoted, the courts refused to assume perpetual supervision of the acts of the parties. Modern courts of equity do not leave an applicant remediless merely because they cannot divest themselves of jurisdiction by the entry of a single decree disposing of all present and future issues by the expiration of the then current term of court. In *Union Pacific Railway Company* v. *Chicago, Rock Island & Pacific Railway Company*, 163 U. S. 564, it was urged as an objection to the specific enforcement of a railway operating contract (page 600) that "equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment and technical knowledge." That view is rejected, however, since the decree was deemed complete in itself, and the retention of jurisdiction to supervise its execution was a matter of detail. This court said at page 600:

> "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated'; and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to sat-

> isfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. Sec. 111."

In *Joy* v. *St. Louis*, 138 U. S. 1, the decree (p. 16) defined the terms and conditions upon which one railroad was entitled under a certain agreement to use the tracks of another, and enjoined the latter from preventing such use. In affirming the decree this court said that the refusal of specific performance in *Rutland Marble Company* v. *Ripley*, 10 Wall. 339, was for the reason, among others, that "the court could make no decree which would end the controversy, and the case would have to remain in the court forever." The opinion then proceeds (p. 47):

> "In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances."

In *City of La Follette* v. *La Follette Water Co.* 252 Fed. 762, already cited, the opinion adopted by the Circuit Court of Appeals, contained this language (p. 774):

> "It should further, in my judgment, be an equitable provision of the decree for specific performance that the plaintiff consent that this cause shall be retained on the docket to the end that if at any time the plaintiff shall fail to perform its part of the contract, or advancement in science shall disclose new methods of improving the water which

> can be installed at a reasonable expense and which can reasonably be required of the plaintiff in a water works system of the character in question, considering all the surrounding circumstances, or the water should become from any cause dangerous to the health of the inhabitants, the defendant shall have leave to apply to the court in supplemental proceedings for such relief as it may be entitled to receive in the premises as a condition of keeping the decree for specific performance in full force and effect."

Other pertinent cases indicative of the broad powers exercised by courts of equity in the enforcement of continuing contracts are:

Texas Co. v. *Central Fuel Oil Co.* 194 Fed. 1, 14.

Great Lakes Co. v. *Scranton Coal Co.* 239 Fed. 603.

American Smelting Co. v. *Bunker Hill Mining Co.* 248 Fed. 172, 182.

Kearns-Gorsuch Co. v. *Hartford-Fairmont Co.* 1 Fed. (2d) 318.

In the relief necessary to do justice in the present case there is nothing beyond the ordinary competency of a court of equity. It is not even subject to the doubts attending applications for specific performance. When the right of plaintiff to improve its property is once determined and the defendants are barred from interference with the exercise of its rights, it will then, and not before, be in a position to proceed with the preparation of plans and arrangements for putting them into effect. The court, if security is deemed necessary, can retain jurisdiction to determine its character and approve it when offered, and can reserve jurisdiction so as to give the lessors opportunity to object to the building plans or their execution as not conformable to the requirements of the leases or the terms of the decree. We are not ap-

prehensive about such objections after the primary right to build has been settled, since the obstacles interposed by the defendant do not relate to the character of any building which the plaintiff might erect, but go to the right of the plaintiff to build at all without previous increase of the ground rentals. We do not suppose that this court will prescribe the provisions of a decree in minute detail.

The petitioners manifest much formal concern about the "cross easements" which "have become appurtenant to each fee" (Brief, p. 37) and which they think would have to be taken care of in any decree that might have been entered in the separable controversy of the Sears-Slater defendants which warranted the removal of this cause to a federal court. Such rights, if they exist, can be protected by supplemental decree when detailed plans are submitted for approval if the court chooses to reserve jurisdiction for that purpose, but we might stop to inquire, if this were the proper time and place, just what cross easements the petitioners think they have in an obsolete and worthless building which no longer subserves any of the purposes for which it was erected. No such easement can be spelled out of the leases themselves, which are mute on the subject. It arose, if at all, merely by force of the erection of a single building on the property of the lessors with their common consent, and even if its original duration were on any hypothesis measurable by that of the then existing leasehold estates, these have since been so modified by the lessors that the Auditorium leases now expire at dates a century apart. The alleged easement must either last for all time, or else it must expire with the useful life of the building. As was said with respect to a single dwelling built upon adjacent lots:

"Upon principle, the extent of the burden imposed

must be limited by the presumed intention of the parties, having regard to the relations and dependencies of the two estates, and the changes which may reasonably be expected to take place. It is to be considered that the necessity which lies at the foundation of the right arises from the existing relations of artificial structures, for the time being constituting part of the freehold, but liable to be destroyed by the action of the elements or by mere lapse of time. When thus destroyed, it is fair to presume that the parties intend, in the absence of any agreement, that the easement shall end with the necessity which created it. There can be by implication no mutual easement of perpetual support, applicable to future structures."

Pierce v. *Dyer*, 109 Mass. 374.

Other decisions, some of them relating to party walls, but all illustrative of the same principle, are:

Moore v. *Shoemaker*, 10 App. Cas. (D. C.) 6.
Partridge v. *Gilbert*, 15 N. Y. 601.
Heartt v. *Kruger*, 121 N. Y. 386; 24 N. E. 841.
Bonney v. *Greenwood*, 96 Me. 335; 52 Atl. 786.
Antomarchi v. *Russell*, 63 Ala. 359.
Jackson v. *Bruns*, 129 Iowa 616; 106 N. W. 1.
Odd Fellows Assn. v. *Hegele*, 24 Ore 16; 32 Pac. 679.

We do not suppose this court would concern itself at the present time with details of the interior arrangement or interconnection of the edifice with which the plaintiff expects to replace the Auditorium Building, nor do we anticipate any difficulty about the building plans after the ability of the lessors to block any improvement until their demands are complied with shall be definitely negatived by decree of the proper court.

There was nothing novel or exceptional in the method which this court followed in *Sharon* v. *Tucker* upon reversal of a judgment for the defendant where the record discloses no material dispute about the facts which would support a judgment for the plaintiff.

Fort Scott v. *Hickman,* 112 U. S. 150.
Pullman Car Company v. *Metropolitan Ry Co.* 157 U. S. 94, 112.
Meyer v. *Richards,* 163 U. S. 385, 415.
Fulton v. *Krull,* 200 N. Y. 105, 93 N. E. 494.
Miller v. *Staggs,* 266 Mo. 339, 181 S. W. 116.

We earnestly request this court to dispose of the merits of the case now, and pray that the court will, in pursuance of the prayer of the bill, direct the entry of a decree which will enable the plaintiff to have the beneficial use of its property.

Respectfully submitted,

Walter L. Fisher,
William C. Boyden,
William W. Case,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 561.

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES, AND MARK SKINNER WILLING,
Petitioners,

vs.

CHICAGO AUDITORIUM ASSOCIATION,
Respondent.

SUPPLEMENTAL AUTHORITIES FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL AUTHORITIES FOR RESPONDENT.

These Respondents respectfully submit the following additional authorities in answer to the citations on pages 15 and 16 of the Petitioners' reply brief with respect to the policy of this Court in dealing with the merits of a case pending therein on writ of certiorari.

Delk v. St. Louis, etc., R. R. Co., 220 U. S. 580 (Opinion by Mr. Justice Harlan)

"As the case is here upon certiorari to review the judgment of the Circuit Court of Appeals, this Court has the entire record before it, with the power to review the action of that court as well as direct such disposition of the case as that court might have done." Since, however, the District Court's judgment was right, all that was necessary was to affirm it.

Camp v. Gress, 250 U. S. 308 (Opinion of Mr. Justice Brandeis)

Judgment against three defendants was affirmed by the Court of Appeals. On certiorari a plea of one defendant to the venue was held good and the District Court was directed to dismiss as to him. Judgment was affirmed as to the others, whose objection to the measure of damages was overruled, but the opinion says: "The contention must be examined, as the whole case is here on certiorari."

Cole v. Ralph, 252 U. S. 280 (Opinion by Mr. Justice Vandevanter)

Adverse possession, without discovery of a vein of ore, is held on certiorari to be no defense. Judgment of the Court of Appeals is reversed and that of the District Court affirmed, since a jury had found there was no discovery. The court, however, first examines a number of other defenses, and declares the applicable law, rejecting them all. If any had been sustained, the cause would evidently have been remanded with directions to proceed accordingly. The Court said:

"In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better, inasmuch as counsel have united in presenting to us all questions thought to arise on the record, and the litigation already has covered a considerable period."

(The precise date of filing the bill is not shown in any report of the case, but it was after September 24, 1914, and the case was argued in the Supreme Court December 8, 1919. The Auditorium bill was filed February 15, 1923.)

Kendall v. Ewert, 259 U. S. 139 (Opinion by Mr. Justice Clarke)

On appeal, *Cole v. Ralph* is cited to show that the whole cause is before the Court for disposition, and not merely the grounds on which the Court of Appeals based its decision. The District Court had dismissed the bill, but the evidence is reviewed, the law declared, judgment reversed, and the cause remanded to the District Court with direction to enter a decree for plaintiff as outlined in the opinion and mandate.

Gerdes v. Lustgarten, 266 U. S. 321 (Opinion by Mr. Justice Sanford)

The District Court refused to discharge a bankrupt, but did not find whether a financial statement he had made was false. The Court of Appeals held him entitled to his discharge since the creditor was not justified in relying on the statement whether it was false or not. On certiorari, this court held that the creditor was entitled to rely on the statement, and the judg-

ments of both courts were reversed, with a mandate to the District Court to ascertain whether the statement was false or not, and to grant or refuse the discharge accordingly. *Cole v. Ralph* is cited as an authority for the following:

> "We may now either determine these questions upon an independent examination of the testimony, or remand the case for further proceedings in order that they may be determined in the lower court."

McCardle vs. Indianapolis Water Co., 272 U. S. 400 (Opinion by Mr. Justice Butler)

The majority opinion, and Mr. Justice Brandeis in the minority opinion, both cited *Cole v. Ralph* to the effect that the court, having the evidence before it, has power to examine the facts and determine, in the light of the legal principles announced, whether they justify the decree. The majority opinion holds that they do, while the minority considers that the better practice would be to remand to the lower court to pass on the facts *in the light of the legal principles announced by the Court.*

Respectfully submitted,

WALTER L. FISHER,
WILLIAM C. BOYDEN,
WILLIAM W. CASE,
Counsel for Respondents.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 561

MARK SKINNER WILLING AND THE NORTHERN TRUST COMPANY, AS TRUSTEES, ETC., ET AL., PETITIONERS,

vs.

CHICAGO AUDITORIUM ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1937

CERTIORARI GRANTED NOVEMBER 22, 1937

(33,013)

(33,013)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

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INDEX

	Page
Record from the district court of the United States, northern Illinois.	1
Caption	1
Record from district court of Cook County	2
Bill of complaint	2
Exhibit 1—Plat of property	33
Exhibit 2—First Walker lease, dated January 17, 1887	34
Exhibit 3—Agreement with Henry J. Willing, dated July 9, 1891	48
Exhibit 4—Second Walker lease, dated January 17, 1887	51
Exhibit 5—Agreement with Henry J. Willing, dated July 9, 1891	65
Exhibit 6—Peck lease, dated January 24, 1887	68
Exhibit 7—Agreement with Francis Barlett, trustee, et al., dated July 10, 1891	85
Exhibit 8—First Studebaker lease, dated February 1, 1887	90
Demurrer of Ill. Trust & Sav. Bank, trustee, et al.	104
Demurrer of Emily C. Chapin et al	109
Demurrer of Ambrose Cramer et al	111
Petition for removal	112

45583

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Page

Order removing cause to United States district court..... 118
Certificate of clerk..... 119
Motion of Wm. A. Slater et al. to dismiss..... 120
Order appointing H. R. Platt guardian ad litem for minors, etc. 122
Order that demurrer of Ambrose Cramer et al. filed in State court stand as motion to dismiss in United States district court, etc. 122
Amendments to bill of complaint..... 123
Exhibit 9—First Studebaker lease, dated February 1, 1887.. 130
Exhibit 10—Second Studebaker lease, dated September 10, 1887 134
Order that demurrer of Illinois Trust & Savings Bank and motions to dismiss bill stand as motions to dismiss bill as amended 135
Answer of H. K. Chapin, Jr., et al., by Henry Russell Platt, filed December 31, 1923..... 136
Motion of Ambrose Cramer et al. to dismiss..... 137
Motion of Louis M. Greeley, guardian ad litem, to dismiss..... 139
Order denying motions to dismiss..... 140
Decision, filed April 18, 1924, on motion to dismiss..... 140
Amendments and supplement to bill of complaint, filed April 25, 1924 142
Answer of Illinois Merchants Trust Co..... 143
Caroline P. McCready et al..... 151
Charles S. Dewey et al..... 153
Albert W. Harris et al..... 155
Order of June 2, 1924, appointing Roswell B. Mason guardian ad litem 158
Answer of Louis M. Greeley, guardian ad litem..... 158
Order of June 10, 1924, substituting Northern Trust Co. as trustee 159
Answer of Northern Trust Co..... 160
Wm. A. Slater et al..... 173
John Fox Slater et al., by R. B. Mason, guardian ad litem 188
Emily S. Chapin et al..... 189
Coolidge M. Chapin et al., by Henry Russell Platt, guardian ad litem..... 192
Motion of L. M. Greeley to remand..... 192
Northern Trust Co. et al. to remand..... 194
M. S. Willing to remand..... 195
Order overruling motion of M. S. Willing to remand..... 196
Order overruling motion of Northern Trust Co. et al. to remand. 196
Order overruling motion of L. M. Greeley to remand and granting C. C. Bullock leave to file intervening petition..... 197
Statement of evidence..... 197
Offers in evidence..... 198
Testimony of Stephen G. Morse..... 201
John H. C. Templeton..... 206
Frederick C. E. Lundgren..... 207
Mark Skinner Willing..... 207

Page

Testimony of Harry R. Hurlbut 209
Edwin A. Seipp 209
Lewis L. McArthur 209
Edwin H. Taylor 210
Fred J. Buchal 213
Morris L. Greeley 213
Exhibit No. 36—Plat of auditorium 215
Exhibit No. 38—Statement showing levels at various points 221
Testimony of A. N. Rebori 225
Edwin C. Searles 226
R. Floyd Clinch 227
Dudley Ward O'Neals 229
R. Floyd Clinch (recalled) 231
Exhibit "O"—Letter from Pearson to Clinch, March 30, 1925 237
Exhibit No. 41—Letter, April 8, 1925, Alexander to Clinch 238
Exhibit No. 42—Letter, February 17, 1925, Halsey-Stuart Co. to Clinch 239
Testimony of Wm. Wesley Gilkenson 265
Exhibit No. 44—Summary of profit and loss and surplus for years 1889 to 1923 266
Exhibit No. 46—Values of near by lots 279
Exhibit No. 46-A—Values of near by buildings 281
Testimony of John Dorr Bradley 284
Bernard H. Lichter 290
Theodore E. Wade 294
Lawrence T. Parker 304
Louis E. Ritter 317
Ernest R. Graham 338
Charles E. Fox 342
R. Floyd Clinch (recalled) 375
Frederick C. Lundgren (recalled) 377
Exhibit No. 78—Statement of taxes, 1888 to 1923 379
Statements re certain exhibits 381
Testimony of Edward J. Freiberg 382
Bruce B. Bort 384
Hugh N. Smith 384
Lawrence G. Parker (recalled) 385
Edward A. Renwick 388
Louis E. Ritter (recalled) 401
Edward A. Renwick 407
Andrew Rebori 438
Paul F. P. Mueller 440
Henry J. Burt 468
Exhibit No. 14—Table showing safe load in pounds 474
Testimony of Frederick J. Thielbar 475
Joseph Fisher 498
Carl C. Bullock 498
Frederick J. Thielbar (recalled) 499
Henry G. Miller 505

Page

Statements re certain exhibits 507
Mason Exhibits 1 and 2—Letters from Marshall & Fox to Clinch 508
Plaintiff's Exhibit 79—Letter to Clinch, April 10, 1917 512
Statements re certain exhibits 515
Testimony of Wm. M. Knight 520
Louis E. Ritter (recalled) 525
Charles E. Fox (recalled) 531
Judge's certificate 538
Notice of filing of statement of evidence 539
Order certifying certain exhibits to court of appeals 540
Notice of petition for appeal 541
Decision, Wilkerson, J 542
Decree 563
Petition for appeal 564
Assignment of errors 564
Appeal bond 565
Order allowing appeal 568
Notice of additional præcipe 569
Stipulation that original statement of evidence be incorporated in record 571
Order that original statement of evidence be incorporated in record 572
Præcipe for transcript 572
Additional præcipe 575
Certificate of clerk 576
Citation and service 577
Proceedings in United States circuit court of appeals, seventh circuit. 583
Clerk's certificate 583
Appearance of counsel 585
Certificate of clerk to original exhibits 586
Appearance of counsel 587
Stipulation fixing time for filing briefs 588
Order setting time for filing briefs 590
Appearance of counsel 591
Appearance of counsel 592
Order setting cause for hearing 593
Hearing 594
Opinion, Evans, J., and decree 595
Petition for rehearing 613
Motion to vacate all orders heretofore entered 638
Proof of service of petition for rehearing 651
Notice of motion to vacate all orders heretofore entered 652
Answer to petition for rehearing 654
Proof of service of answer to petition for rehearing 662
Order denying motion to vacate all orders heretofore entered herein, etc. 664
Order denying petition for rehearing 664
Order staying mandate 665
Clerk's certificate 667
Order allowing certiorari 668

1 Pleas in the District Court of the United States for the Place
Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable James H. Wilkerson District Judge of the United States for the Northern District of Illinois, on 30th day of January, in the year of our Lord one thousand nine hundred and Twenty-six, being one of the days of the regular December Term of said Court, begun Monday, the 21st day of December, and of our Independence the 150th year.

Present:

Honorable James H. Wilkerson.

Palmer E. Anderson, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

Chicago Auditorium Association
vs.
Ambrose Cramer, Trustee, *et al.* } No. 3586.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Bill of Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, on this the 13th day of June, 1923.

3 State of Illinois, } ss.
County of Cook. }

IN THE CIRCUIT COURT OF COOK COUNTY.

Chicago Auditorium Association,
Complainant,
vs.
Ambrose Cramer, Trustee, *et al.*,
Defendants. } In Chancery. No. B-94431.

BILL OF COMPLAINT.

Filed February 15, 1923.

FISHER, BOYDEN, KALES & BELL,
Solicitors for Complainant.

State of Illinois, } ss.
County of Cook. }

Filed J
1922.

IN THE CIRCUIT COURT OF COOK COUNTY.

To the Honorable the Judges of said Circuit Court of Cook County, in Chancery Sitting:

Your orator, Chicago Auditorium Association, a corporation organized and existing under the laws of the State of Illinois, and having its principal office in the City of Chicago in said county and state, brings this its bill of complaint against Ambrose Cramer, as trustee, and the other defendants hereinafter named, and respectfully represents unto your Honors as follows:

1. Your orator is a corporation duly organized by the name "Chicago Grand Auditorum Association" on or about the eighth day of December, 1886, under and pursuant to the act of the General Assembly of the State of Illinois approved April 18, 1872, entitled "An Act Concerning Corporations," as amended, and its certificate of incorporation was duly filed for record in the office of the recorder of Cook County, Illinois, December 8, 1886, and was there duly recorded in Book 20 of Corporations at page 380, as Document No. 779853. The amount of capital stock of your orator originally authorized was seven hundred and fifty thousand dollars ($750,000), divided into seven thousand five hundred (7,500) shares of one hundred dollars ($100) each; and the purpose for which your orator was formed, as set forth in its articles and certificate of incorporation, was as follows:

To construct and maintain in the City of Chicago a building or buildings containing a large auditorium and other rooms and apartments for any and all purposes of profit, gain and entertainment; to organize and conduct and to
5 provide facilities and arrangements for musical, dramatic, operatic and other entertainments; to encourage, promote and arrange for the holding of large political and other conventions and meetings in said city; to establish galleries for the exhibition of works of art; and to found and maintain societies and associations for the encouragement of the useful and aesthetic arts; with power to hold and dispose of stock in other corporation, and to preempt its own stock.

By proceedings duly taken in accordance with the requirements of law your orator's name was in or about the month of January, 1887, changed from "Chicago Grand Auditorium Association" to "Chicago Auditorium Association," and the amount of its capital stock was increased first to one million five hundred thousand dollars ($1,500,000), and afterwards, in or about the month of December, 1889, to two million dollars ($2,000,000), consisting of twenty thousand (20,000) shares of the par value of one hundred dollars ($100) each, of which there are now issued and outstanding 17,653 shares of the aggregate par value of $1,765,300, all fully paid and nonassessable. On or about January 13, 1923, by proceedings duly taken in accordance with the requirements of the laws of the State of Illinois, your orator's articles of incorporation were amended by changing the purposes for which your orator was formed so that the purposes and objects of your orator as a corporation should be, and they now are, as follows:

To organize and conduct and to provide facilities and arrangements for musical, dramatic, operatic and other entertainments; to encourage, promote and arrange for the holding of large political and other conventions and meetings in the City of Chicago; to establish galleries for the exhibition of works of art; to found and maintain societies and associations for the encouragement of the useful and aesthetic arts; to construct, manage and operate safety deposit vaults; and to conduct and operate a hotel or hotels in said City of Chicago and do a general hotel business.

6 The certificate of said amendment, issued by the Secretary of State in accordance with the statute in such case made and provided, was filed for record January 17, 1923, in the office of the recorder of Cook County, Illinois, where its principal office was and is located, and was there duly recorded in Book 337 of Corporations, at page 163, as Document No. 7779534.

2. Immediately after its incorporation in the year 1886, your orator proceeded to exercise certain of the corporate powers conferred upon it by its articles and certificate of incorporation, and entered upon the conduct of the business activities authorized thereby, including the business of organizing and conducting and providing facilities and arrangements for musical, dramatic, operatic and other entertainments, and encouraging, promoting and arranging for

the holding of large political and other conventions and meetings in the said City of Chicago, and in connection with and pursuance of the conduct of the business authorized by its charter as aforesaid your orator erected the building and auditorium hereinafter more particularly described upon certain real estate in said City of Chicago, hereinafter referred to as the "Auditorium Property," consisting of the following described lots and parcels of land, to wit:

Parcel 1

Lot seven (7), the south fifty-four (54) feet of lot eight (8), all of lot nine (9), and sublots one (1) and four (4) of Ely and Reynolds' Subdivision of lot ten (10) in block nine (9) in Fractional Section Fifteen Addition to Chicago.

Parcel 2

Sublots two (2) ,three (3), five (5) and six (6) of Ely and Reynolds' Subdivision of lot ten (10) in block nine (9) in Fractional Section Fifteen Addition to Chicago,
7 together with such portion of an alley about ten (10) feet in width, beginning at Congress street and running north eighty (80) feet more or less along the west side of said sublot three (3) and also east of and abutting upon sublots four (4), five (5) and six (6) of said lot ten (10), as adjoins or pertains to said sublots three (3), five (5) and six (6).

Said Parcel 2 is otherwise described as follows:

That part of original lot ten (10) in block nine (9) in Fractional Section Fifteen Addition to Chicago described as follows, to-wit: Commencing at the southwest corner of said lot ten (10) being at the intersection of the east line of Wabash avenue and the north line of Congress street; thence running east along the south line of said lot ten (10), being the north line of Congress street, one hundred fifty-five and five-tenths (155.5) feet more or less to a point in the south line of said lot ten (10) which is twenty-five (25) feet west of the southeast corner of said lot; thence running north, on a line parallel with the east line of said lot ten (10), eighty (80) feet more or less to a point in the north line thereof which is twenty-five (25) feet west of the northeast corner of said lot; thence running west on

the north line of said lot ten (10) to a point in said north line which is one hundred and five-tenths (105.5) feet east of the northwest corner of said lot ten (10); thence running south, parallel with the west line of said lot ten (10), twenty-five (25) feet; thence running west, parallel with the north line of said lot, one hundred and five-tenths (100.5) feet to a point in the west line of said lot ten (10) which is twenty-five (25) feet south of the northwest carner of said lot ten (10); thence running south on the west line of said lot ten (10), being the east line of Wabash avenue, fifty-five (55) feet more or less to the place of beginning.

Parcel 3.

Lots eighteen (18) and nineteen (19) in the Assessor's Division of lots one (1), two (2), three (3), four (4), five (5) and eight (8) in block nine (9) in Fractional Section Fifteen Addition to Chicago.

8 The said Auditorium Property above described is situated in the City of Chicago, in the heart of the business, theater and hotel district, bounded on the west by Wabash avenue, on the south by Congress street, and on the east by Michigan avenue, and the several lots and parcels of which it consist are correctly represented in their relation to each other and to said streets by a plat attached hereto, marked "Exhibit 1," and hereby made a part of this bill of complaint; and your orator, in the manner hereinafter more particularly described, acquired title to certain long term leasehold interests in the aforesaid premises, which were necessary and proper for the transaction of its business and to carry out the objects and purposes designated in its charter and articles of incorporation.

3. On or about the 17th day of January, 1887, one Wirt D. Walker, being then the owner in fee simple of the following described real estate, to wit:

Lot nine (9) and the south fifty-four (54) feet of lot eight (8) in block nine (9), and sublot one (1) of Ely and Reynolds' Subdivision of lot ten (10) in said block nine (9), all in Fractional Section Fifteen Addition to Chicago,

said real estate being a portion of Parcel 1 hereinabove described and having a frontage on the west side of Michigan avenue of 134 feet, more or less, and on the north side of Congress street of 205.65 feet, more or less, executed and delivered to your orator a certain indenture of lease of that date, hereinafter termed for convenience the first Walker

lease, demising and leasing said real estate to your orator for a term of ninety-nine years from and after August 1, 1886, and until August 1, 1985; which lease was filed in the office of the recorder of Cook County, Illinois, August 22, 1887, and was there recorded in Book 2129 of Records, at page 183, as Document No. 863551. A true copy of said lease is attached hereto, marked "Exhibit 2," and is made a
9 part of this bill of complaint. Thereafter, the title in fee simple to the said premises last above described having passed by mesne conveyances to and become vested in one Henry J. Willing, a certain agreement in writing was entered into between your orator and the said Henry J. Willing, dated July 9, 1891, whereby the term of said lease was extended for an additional period of one hundred years, so that said term will expire on the first day of August in the year 2085, and whereby it was further agreed that the annual rental reserved and payable for said demised premises under said indenture of lease for the period of five years commencing August 1, 1891, and expiring July 31, 1896, should be the sum of thirteen thousand five hundred dollars ($13,500) in each year, and for the period from and after July 31, 1896, until the expiration of the term of said lease as so modified and extended, the sum of fifteen thousand dollars ($15,000) in each year; which said agreement, dated July 9, 1891, was filed in the office of the recorder of Cook County, Illinois, August 5, 1891, and was there recorded in Book 3474 of Records, at page 549, as Document No. 1515340. A true copy of said agreement is attached hereto, marked "Exhibit 3," and is made a part of this bill of complaint.

On or about the said 17th day of January, 1887, said Wirt D. Walker, being then also the owner in fee simply of the following described seal estate, to wit:

Lot seven (7) in block nine (9), and sublot four (4) of Ely and Reynolds' Subdivision of lot ten (10) in said block nine (9), all in Fractional Section Fifteen Addition to Chicago, said real estate being a portion of said Parcel 1 and having a frontage on the east side of Wabash avenue of 105 feet, more or less, executed and delivered to your orator a certain other indenture of lease of that date, hereinafter termed for convenience the second Walker lease, demising and leasing said real estate to your orator for a term of ninety-nine
10 years from and after August 1, 1886, and until August 1, 1985; which lease was filed in the office of the recorder of Cook County, Illinois, August 22, 1887, and was there re-

corded in Book 2147 of Records, at page 11, as Document No. 863552. A true copy of said lease is attached hereto, marked "Exhibit 4," and is made a part of this bill of complaint. Thereafter, the title in fee simple to the said premises sati above described having passed by mesne conveyances to and become vested in said Henry J. Willing, a certain agreement in writing was entered into between your orator and said Henry J. Willing, dated July 9, 1891, whereby the term of said lease last aforesaid was extended for an additional period of one hundred years, so that said term will expire on the first day of August in the year 2085, and whereby it was further agreed that the annual rental reserved and payable for said demised premises under said indenture of lease for the period of five years commencing August 1, 1891, and expiring July 31, 1896, should be the sum of thirteen thousand five hundred dollars ($13,500) in each year, and for the period from and after July 31, 1896, until the expiration of the term of said lease as so modified and extended, the sum of fifteen thousand dollars ($15,000) in each year; which said agreement, dated July 9, 1891, was filed in the office of the recorder of Cook County, Illinois, August 5, 1891, and was there recorded in Book 3427 of Records, at page 559, as Document No. 1515341. A true copy of said agreement is attached hereto, marked "Exhibit 5," and is made a part of this bill of complaint.

The portion of the Auditorium Property demised and leased to your orator by the two leases aforesaid from Wirt D. Walker, being the same property above described as Parcel 1, is hereinafter sometimes referred to for convenience as the Walker property, and the interest of your orator as lessee of said property as the Walker leasehold interest.

11 4. On or about the 24th day of January, 1887, Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck, being then the owners in fee simple of the following described real estate, to wit:

Sublots two (2), three (3), five (5) and six (6) of Ely and Reynolds' Subdivision of lot ten (10) in Block nine (9) in Fractional Section Fifteen Addition to Chicago, together with such portion of an alley about ten (10) feet in width, beginning at Congress street and running north eighty (80) feet more or less along the west side of said sublot three (3) and also east of and abutting upon sublots four (4) five (5) and six (6) of said lot ten (10), as adjoins or pertains to said sublots three (3), five (5) and six (6),

said real estate being that hereinabove described as Parcel 2, executed and delivered to your orator a certain indenture of lease of that date, hereinafter termed for convenience the Peck lease, demising and leasing said real estate to your orator for a term of ninety-nine years from and after August 1, 1886, and until August 1, 1985; which lease was filed in the office of the recorder of Cook County, Illinois, July 29, 1887, and was there recorded in Book 2106 of Records, at page 473, as Document No. 855865. A true copy of said lease is attached hereto, marked "Exhibit 6," and is made a part of this bill of complaint. Thereafter, the title in fee simple to the said premises last above described having passed by mesne conveyances to and become vested in one Francis Bartlett, as trustee for Caroline Bartlett under the will of John F. Slater, deceased, and in one William A. Slater, as equal tenants in common, a certain agreement in writing was entered into between your orator and the said Francis Bartlett, trustee as aforesaid, and the said William A. Slater, dated July 10, 1891, whereby the term of said lease was extended for one hundred years and one day, so that said term will expire on the first day of August in the year 2085, and whereby it was further agreed that the annual rental reserved and payable for said demised premises under said
12 lease until and including July 31, 1896, should be the sum of eleven thousand six hundred and ten dollars (11,610) in each year, and for the period from August 1, 1896, until the expiration of the term of said lease as so modified and extended, the sum of fourteen thousand dollars ($14,000) in each year; which said agreement dated July 10, 1891, was filed in the office of the recorder of Cook County, Illinois, August 7, 1891, and was there recorded in Book 3426 of Records, at page 526, as Document No. 1516570. A true copy of said agreement is attached hereto, marked "Exhibit 7," and is made a part of this bill of complaint.

The portion of the Auditorium Property demised and leased to your orator by the aforesaid lease from Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck, being the same property above described as Parcel 2, is hereinafter sometimes referred to for convenience as the Peck property, and the interest of your orator as lessee of said property as the Peck leasehold interest.

5. On or about the first day of February, 1887, Studebaker Brothers Manufacturing Company, a corporation of

the State of Indiana, being then the owner in fee simple of the following described real estate, to wit:

Lot eighteen (18) in the Assessor's Division of lots one (1), two (2), three (3), four (4), five (5) and eight (8) in block nine (9 in Fractional Section Fifteen Addition to Chicago,

said real estate being a portion of the property hereinabove described as Parcel 3, executed and delivered to your orator a certain indenture of lease of that date, hereinafter termed for convenience the first Studebaker lease, demising and leasing said real estate to your orator for a term of ninety-nine years from and after August 1, 1886, and until August 1, 1985; which said lease was filed in the office of the recorder of Cook County, Illinois, July 19, 1887, and was there recorded in Book 2106 of Records, at page 377, as Docu-
13 ment No. 852541. A true copy of said lease is attached hereto, marked "Exhibit 8," and is made a part of this bill of complaint.

On or about the said first day of February, 1887, said Studebaker Brothers Manufacturing Company, being also the owner in fee simple of the following described real estate to wit:

Lot ninteen (19) in the Assessor's Division of lots one (1), two (2), three (3), four (4), five (5) and eight (8) in block nine (9) in Fractional Section Fifteen Addition to Chicago,

said real estate being a portion of the property hereinabove described as Parcel 3, executed and delivered to the complainant a certain other indenture of lease of that date, hereinafter termed for convenience the second Studebaker lease, demising and leasing said real estate to your orator for a term of ninety-nine years from and after August 1, 1886, and until August 1, 1985; which said lease was filed in the office of the recorder of Cook County, Illinois, July 19, 1887, and was there recorded in Book 2074 of Records, at page 545, as Document No. 852543. Said lease is in words and figures substantially identical with the lease of the above described Lot Eighteen (18), of which a copy is hereto attached marked "Exhibit 8," except (1) that the premises demised are described as Lot Nineteen (19) instead of Lot Eighteen (18) in the said Assessor's Division; and (2) the frontage of said premises on Michigan avenue is given as twenty-six (26) feet instead of twenty-six and sixty-seven one-hundredths

(26.67) feet; and (3) instead of the words "One thousand and fifty dollars ($1,050)" appearing in said Exhibit 8 as specification of the rent for the first year of the term, there appear in said lease of Lot Nineteen (19) the words ,"One Dollar ($1.00), the receipt of which is hereby acknowledged." Your orator refers to said Exhibit 8, hereinabove made a part of this bill of complaint, as a copy of said lease of said Lot Nineteen (19) save for the differences above indicated.

14 In and by each of said indentures of lease executed by the Studebaker Brothers Manufacturing Company it was provided that for the ninteen (19) years of the term thereof from August 1, 1887, until August 1, 1906, the lessee should pay to the lessor a yearly rental of eighteen hundred dollars ($1800), and that for the residue of the term thereof from and after August 1, 1906, the lessees hould pay to the lessor, as rent for said demised premises, a sum equal to six (6) per cent per annum of the fair cash value of said premises as determined by appraisals to be made at the beginning of each period of ten years, commencing on the first day of August, 1906, and thereafter throughout the remainder of said terms. Pursuant to the terms of said leases and in the manner provided and agreed therein and on or about July 21, 1916, the fair cash value of said lot eighteen (18) was duly appraised and fixed at $286,937.61, and that of said lot nineteen (19) at $279,729.06, making a total appraised valuation of said lots eighteen (18) and nineteen (19) of $566,666.67; so that the annual rent payable by the lessee to the lessor under said two leases last aforesaid for the ten-year period commencing August 1, 1916, and ending July 31, 1926, is six (6) per cent of said appraised valuation last aforesaid, or the sum of thirty-four thousand dollars ($34,000) in each year for said two lots.

The portion of the Auditorium Property demised and leased to your orator by the two leases aforesaid from Studebaker Brothers Manufacturing Company, being the same property above described as Parcel 3, is hereinafter sometimes referred to for convenience as the Studebaker property, and the interest of your orator as lessee of said property as the Studebaker leasehold interest.

6. The title in fee simple to the said Walker property hereinabove further designated as Parcel 1, and demised as aforesaid to your orator by Wirt D. Walker, has by

15 mesne conveyances passed from him to, and is now vested in certain undivided fractional parts in, Ambrose

Cramer and Mark Skinner Willing, as sole surviving trustee under the last will and testament of Henry J. Willing, deceased, and in the said Mark Skinner Willing in his personal right, and the said Mark Skinner Willing is entitled during his liftetime to the entire net income of said Walker property, either as owner thereof in fee simple or under the terms of said testator's will. The said Mark Skinner Willing's three children and only living descendants, Margaret Willing Evelyn Pierrepont Willing and Mark Skinner Willing, Jr., all of whom are infants under the age of eighteen years, have or claim some present or future right, title or interest, vested or contingent, in or to said Walker property under or by virtue of the last will and testament of said Henry J. Willing, who owned said property in fee simple at the time of his death; and they and their father the said Mark Skinner Willing, or some one or more of them, represent all other persons, whether in being or not, who have or may hereafter have any interest in said real estate under or by virtue of the last will and testament of Henry J. Willing, deceased.

7. The title in fee simple to the said Peck property hereinabove further designated as Parcel 2, and demised as aforesaid to your orator by Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck, has by mesne conveyances passed from them to, and is now vested in undivided interests in, certain other persons as hereinafter in this Section 7 set forth:

(a) The titled in fee simple to an undivided one-half of said real estate is vested in William A. Slater, Jr., E. Halsey Malone and Charles Lewis Harrison, as trustees under the last will and testament of William A. Slater, deceased, who owned said undivided one-half of said real estate at the time of his death. Under and by the terms of said will, the testator's widow, Ellen B. Slater, and his two children,
16 William A. Slater, Jr., and Eleanor Malone, so long as all of them are living, are entitled to the entire net income of said undivided one-half of said real estate as a part of the residuary estate of said testator, the said widow to two-thirds thereof and the said two children each to one-sixth thereof. The said Ellen B. Slater, William A. Slater, Jr., and Eleanor Malone, and also John Fox Slater (who is the son and only living descendant of said William Slater, Jr.), and Elena de Struve, Boris de Struve and Adrian Malone (who are the children and only living descendants of said Eleanor Malone) have or claim to have some present or future right, title or interest, vested or con-

tingent, in or to said undivided one-half of the said Peck property under or by virtue of the last will and testament of William A. Slater, deceased; and they, or some one or more of them, represent all other persons, whether in being or not, who have or may hereafter have any interest in said undivided one-half of said real estate under or by virtue of the last will and testament of William A. Slater, deceased. Said John Fox Slater, Elena de Struve, Boris de Struve, and Adrian Malone are all infants under the age of eighteen years.

(b)The title in fee simple to an undivided one-fourth of said real estate is vested in Bayard Warren and Bayard Tuckerman, Jr., as trustees under a deed of trust executed by Elizabeth Sears, afterwards Elizabeth Sears Warren, dated March 3, 1913, and recorded in the office of the recorder of Cook County, Illinois, April 3, 1913, in Book 12347 of Records, at page 94, as Document No. 5156779, as modified by a certain instrument in writing executed by said Elizabeth Sears Warren, formerly Elizabeth Sears, dated June 1, 1920, and recorded in said recorder's office September 16, 1920, in Book 16274 of Records, at page 214, as Document No. 6941122. Said Elizabeth Sears Warren is entitled under said trusts to the entire net income of said undivided one-
17 fourth of said real estate for and during her lifetime, and she and Bayard Warren, Jr., Lily Warren and Camilla Warren, who are her children and only living descendants, and are infants under the age of eighteen years, also have or claim to have some present or future right, title or interest, vested or contingent, in or to said undivided one-fourth of the Peck property under or by virtue of the said deed of trust executed by said Elizabeth Sears, afterwards Elizabeth Sears Warren, and dated March 3, 1913; and they, or some one or more of them, represent all other persons, whether in being or not, who have or may hereafter have any interest in said undivided one-fourth of said real estate under or by virtue of the said deed of trust dated March 3, 1913, or the said instrument in writing dated June 1, 1920.

(c) The title in fee simply to an undivided one-fourth of said real estate is vested in said Bayard Warren and Bayard Tuckerman, Jr., as trustees under a trust deed executed by Phyllis Sears, afterwards Phyllis Sears Tuckerman, dated April 4, 1916, and recorded in the office of the recorder of Cook County, Illinois, April 17, 1916, in Book 13844 of Records, at page 479, as Document No. 5846740, as modified by a certain instrument in writing executed by said Phyllis

Sears Tuckerman, formerlly Phyllis Sears, dated June 1, 1920, and recorded in said recorder's office September 16, 1920, in Book 16311 of Records, at page 69, as Document No. 6941124. Said Phyllis Sears Tuckerman is entitled under said trusts to the entire net income of said undivided one-fourth of said real estate for and during her lifetime, and she and Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, who are her children and only living descendants and are infants under the age of eighteen years, also have or claim to have some present or future interest, vested or contingent, in or to said undivided one-fourth of the Peck property under or by virtue of said deed of
18 trust executed by said Phyllis Sears, afterwards Phyllis Sears Tuckerman,and dated April 4, 1916; and they or some one or more of them represent all other persons, whether in being or not, who have or may hereafter have any interest in said undivided one-fourth of said real estate under or by virtue of the said deed of trust dated April 4, 1916, or the said instrument in writing dated June 1, 1920.

8. The title in fee simple to said Studebaker property, hereinabove further designated as Parcel 3, and demised as aforesaid to your orator by Studebaker Brothers Manufacturing Company, passed to and is now vested in Emily C. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith (formerly Sarah Lucile Chapin Robertson), Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner (formerly Ruby Hortense Chapin), Lowell Mead Chapin, and Charles Douglas Chapin, as trustees under the last will and testament of Charles A. Chapin, deceased, who at the time of his death owned said Studebaker property in fee simple. Said Emily C. Chapin is the widow, and the seven other trustees above named are the only children of the said testator, Charles A. Chapin; and by the terms of said will and the trusts created thereby the said widow is entitled to one-third of the net income of said Studebaker property during her life, and the seven children aforesaid of said testator, so long as they are all alive, are entitled to the rest of said net income. The only living children or descendants of the said seven children of said testator are Charlotte Gardiner Robertson, Helen Emily Bishop, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Henry Kent Chapin, Jr., Chester Crandall Chapin, Charles A. Chapin, Elizabeth Chalifoux Chapin and Coolidge Mead Chapin, who have or claim some

present or future right, title or interest, vested or contingent, in or to the said Studebaker property, under or by virtue of the last will and testament of the said Charles A. Chapin, deceased, and all of whom, except Helen Emily Bishop, are
19 infants under the age of eighteen years; and the said seven children of said Charles A. Chapin, deceased, and their living descendants aforesaid, or some of them, represent all other persons, whether in being or not, who have or may hereafter have any interest in said real estate under or by virtue of the last will and testament of Charles A. Chapin, deceased.

On or about March 5, 1903, The Corporation of the Fine Arts Building, a corporation of the State of Illinois, having acquired and then owning the title in fee simple to the said Studebaker property, conveyed it with other property to the Illinois Trust and Savings Bank, a corporation of the State of Illinois, as trustee, by a certain trust deed dated March 5, 1903, and recorded in the office of the recorder of Cook County, Illinois, April 28, 1903, in Book 8241 of Records, at page 43, as Document No. 3382697, to secure one thousand bonds of The Corporation of the Fine Arts Building aforesaid, in the denomination of one thousand dollars ($1,000) each, aggregating one million dollars ($1,000,000) par value, all bearing interest at the rate of four and one-half (4½) per cent per annum from March 1, 1903, payable semi-annually. Said bonds were due serially, upon various dates up to and including March 1, 1933; and a considerable portion of said bonds are now outstanding in the hands of numerous holders and owners to your orator unknown; and the said trustee, Illinois Trust and Savings Bank, fully represents the legal holders and owners of all of said outstanding bonds.

9. By a certain first mortgage deed of trust dated February 1, 1889, and recorded in the office of the recorder of Cook County, Illinois, February 4, 1889, in Book 2515 of Records, at page 61, as Document No. 1058261, your orator conveyed and assigned all of its leasehold interest in and to the real estate hereinbefore referred to as the Auditorium Property to said Illinois Trust and Savings Bank, an Illinois corporation, as trustee, to secure payment of a principal indebted-
20 ness of your orator amounting to nine hundred thousand dollars ($900,000), as evidenced by its six hundred (600) bonds of the par value of one thousand dollars ($1,000) each, and by its six hundred (600) bonds of the par value of five hundred dollars ($500) each, also dated February 1, 1889, all

maturing February 1, 1929; and there are now outstanding and unpaid eight hundred and thirty-four thousand dollars ($834,000) par value of said bonds and no more.

By a certain second mortgage deed of trust dated February 1, 1892, and recorded in the office of the recorder of Cook County, Illinois, June 30, 1892, in Book 3916 of Records, at page 145, as Document No. 1693161, your orator again conveyed and assigned all of its leasehold interest in and to the real estate hereinbefore referred to as the Auditorium Property to said Illinois Trust and Savings Bank, as trustee, to secure payment of a principal indebtedness of your orator of a par value not exceeding one million six hundred thousand dollars ($1,600,000) as evidenced by its consolidated mortgage bonds of the par value of one thousand dollars ($1,000) each, also dated February 1, 1892, and maturing February 1, 1942; but only seven hundred and sixty-six thousand dollars ($766,000) par value of said consolidated mortgage bonds were ever issued, and of those so issued there have been retired and canceled bonds of the par value of two hundred and twenty-five thousand dollars ($225,000), leaving outstanding five hundred and forty-one thousand dollars ($541,000) par value of said consolidated mortgage bonds.

Each of said mortgage deeds of trust dated respectively February 1, 1889 and February 1, 1892, contains provisions substantially as follows:

"And it is further expressly agreed and understood that if default be made in the payment of any one of the installments of interest aforesaid, at the time and place when and where the same becomes due and payable as aforesaid, (and such default shall continue for thirty days after such in-
21 stallments becomes due and payable as aforesaid), then at the election of the legal holder or holders of not less than one-half of the said bonds then outstanding the whole principal sum secured by this mortgage shall at once become due and payable at the place of payment aforesaid, anything in said bonds or herein contained to the contrary nothwithstanding, such election to be made at any time after the expiration of said thirty days."

"And it is further expressly agreed and understood by the parties hereto and by the legal holder or holders of said bonds, for themselves and for their respective successors, heirs, executors, administrators and assigns, that if the said Chicago Auditorium Association, its successors or assigns, shall at any time hereafter until said principal sum and all

the arrearages of interest thereon shall be fully paid, suffer said premises or any part theerof, to be sold or forfeited for any tax or assessment whatsoever, or shall do or suffer anything that may in any wise tend to diminish the value thereof, or to impair, weaken or diminish the security intended to be effected under and by virtue of this instrument, or shall fail in any wise promptly and faithfully to fulfill, keep and perform all and singular the covenants and agreements herein contained by it or them to be kept and performed, then or in either or any of said events the said principal sum of money mentioned in said bonds shall at the election of the legal holder or holders of not less than one-half of said bonds then outstanding at once become and be due and payable at the place of payment in said bonds mentioned."

The holder of the outstanding bonds issued by your orator and secured by the aforesaid mortgage deeds of trust dated February 1, 1889, and February 1, 1892, respectively are very numerous, and the names of many of said bondholders are unknown to your orator; but for the purposes of this suit the holders of all bonds issued under and secured by said deed of trust dated February 1, 1889, are in fact represented by the trustee named in that deed of trust, and the holders of all bonds issued under and secured by said deed of trust dated February 1, 1892, are in fact represented by the trustee named therein.

22 10. Upon the execution of the five leases aforesaid, two from Wirt D. Walker, one from Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck, and two from Studebaker Brothers Manufacturing Company, your orator took possession of the real estate demised by said several leases hereinabove referred to collectively as the Auditrouim Property, and proceeded at once, by and with the knowledge, consent and procuration of all of the lessors in said several leases, to erect thereon one entire building, which was completed on or about December 1, 1889, at a cost of more than three million dollars ($3,000,000) and is the building now situated on said property, commonly known as the Auditorium Building. The cost of said building was defrayed out of the capital stock of your orator and out of the proceeds of the bonds hereinabove referred to. None of those parts of said building which are located upon the respective tracts of ground demised by the Walker leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the

execution of the five original leases aforesaid, all of which were substantially identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium Property, and the present building was constructed in accordance with such intention, and could not be dismembered without heavy expense and loss. These conditions have existed continuously ever since the erection of said Auditorium Building, and all subsequent purchasers of said property or any part thereof acquired their interests therein with full knowledge of said existing conditions and of the character of said building as a single indivisible unit covering the entire property; and it was after the completion of said indivisible building, and with full
23 knowledge of its character aforesaid, that the lessors, or their successors in interest as owners of the fee, executed the aforesaid extensions of their respective leases for an additional term of one hundred years as hereinabove particularly set forth.

11. Said improvement known as the Auditorium Building is a ten-story building of a now obsolete type of construction, having walls of stone and brick and resting upon what is commonly known as a floating foundation, whereas the foundation for a modern steel-construction building of the best type should consist of caisons extending down to bed rock. The exterior walls of said building are what are commonly known as bearing walls, which are constructed of masonry throughout, whereas the exterior walls of a modern fireproof building of the highest type are known as screen walls and are supported upon the construction of the various floors, which are in turn supported by steel columns carrying the weight of the entire building. All of the columns used in the construction of said Auditorium Building are of cast iron, having lugs with which to support the beams and girders of the floor system which are bolted thereto, whereas the columns in a modern fireproof building of the highest type are built up of structural steel members which are riveted together and proportioned to carry the load thrown upon them. The beams and girders in said Auditorium Building have only bolted connections with the columns, whereas in modern fireproof construction of the highest type all joints are made with splice plates, lugs, and angles with riveted connections for rigid fastening and accurate predetermination of the strength

of the construction. The engineering formulas now employed in the construction of a modern fireproof building of the highest type state the limitations of the steel stresses and of the strength of materials used, but such formulas were not complied with in the construction of the Auditorium Building, for the reason that they had not been then determined. Owing to the lack of experience and lack of precedents, the methods of design and construction actually employed in the erection of said building, while the best and most advanced known at the date of said construction, were inadequate and improper from a modern point of view.

12. In or about the year 1886, when your orator acquired its leasehold interests in the real estate constituting the Auditorium Property and commenced the construction of said Auditoruim Building, the property fronting on that part of Michigan avenue south of Congress street was improved only with residences. North of Congress street, in addition to a few residences there were also located on the west side of Michigan avenue a residential apartment known as the Beaurivage, a few old residences converted into boarding houses, a livery stable conducted by one Leroy Payne, and a number of two-story and one-story buildings many of which were occupied as saloons. On the east side of said Michigan avenue, extending from Monroe street to Jackson boulevard, there was a large frame structure known as the Exposition Building, north of which stood the Armory or drill hall of a militia organization known as Battery D. On Congress street a portion of the site of the Auditorium Building was formerly occupied by a roller skating rink; and the south side of said Congress street between Michigan and Wabash avenues was improved with three-story residences, most of which, at or about the time of the erection of the Auditorium Building, were used as cheap boarding houses or resorts of doubtful character. At or about the time of the erection of said Auditorium Building, property fronting on Wabash avenue in the vicinity of Congress street was used partly for business purposes, but also to a large extent for cheap or disreputable boarding houses. Since the erection of said building by your orator the character of said neighborhood has changed completely. Michigan avenue has been widened and connected by a boulevard with the Lake Shore drive on the north side of the City of Chicago, and is now the most important thoroughfare in said city and one of the remarkable streets of the country. The land adjoining Michigan

avenue on the east from Randolph street to Twelfth street constitutes a public park known as Grant Park, the only building in which is the monumental art museum of the Chicago Art Institute. The vicinity of the Auditorium Building on the west side of Michigan avenue has become the most desirable and coveted location in said city for large and expensive hotels, office buildings, fashionable stores, clubs and theaters, and contains numerous buildings of this character. There are no longer any dwelling houses in the vicinity of said Auditorium, but property on Michigan avenue is now used almost exclusively for business purposes for a mile and more both to the north and to the south of said building. The character of property fronting on Congress street and Wabash avenue in the neighborhood of said Auditorium Building has also changed completely since the erection of said building; and while said property fronting on Congress street and Wabash avenue has not increased in value to the same extent as that on Michigan avenue, it has come to be used almost exclusively for mercantile purposes and has been improved with numerous large and costly buildings of a mercantile character.

13. Since the aforesaid leases were made there has been a steady enhancement in the value of the land demised by each of said five leases taken separately, and a still greater enhancement in the value of the five fees comprising the entire Auditorium Property if merged into a unit and susceptible of improvement as such. The annual rental fixed by each of said leases for the period of nineteen years from August
26 1, 1887, to July 31, 1906, was a certain percentage of the land value originally agreed upon by the parties thereto as follows, that is to say: Under the first Walker lease the said annual rent was $10,587.50, being five (5) per cent of a value of $211,750; under the second Walker lease $10,412.50, being five (5) per cent of a value of $208,250; under the Peck lease $11,610, being six (6) per cent of a value of $193,500; under the first Studebaker lease $1,800, being six (6) per cent of a value of $30,000; and under the second Studebaker lease $1,800, being six (6) per cent of a like value of $30,000. The aggregate annual rental reserved by all of said leases during said period of nineteen years was $36,210, and the aggregate value of the several tracts so originally assumed as a basis for the rentals during that period was $637,500.

14. By force of the statutes of the State of Illinois it became and was the duty of the Board of Review of Cook

County, in every fourth year, to determine the full value of each tract or lot in the City of Chicago as of the first day of April in such year, and the values so determined are the basis upon which taxes are levied and extended for a period of four years. In the year 1919, as required by law, the Board of Review of Cook County, Illinois, determined for purposes of assessments and full value of the fee of the property, unimproved and unencumbered, demised by said several leases as follows: By the first Walker lease, $1,940,268; by the second Walker lease $556,872; by the Peck lease, $502648; and by the two Studebaker leases taken together $654,456. The aggregate value of the fees of said several properties, taken separately, as so determined for purposes of taxation in 1919, was $3,654,244, and said valuation of 1919 is the last official valuation made as aforesaid. Said values are for the land alone, not including the building thereon, which was valued by said Board in 1919 for purposes of taxation at $100,000. The values as so determined for taxation in the year 1919 do not exceed, and are probably below, the present actual values of said properties.

27 15. At the present time the rental value of property similar in character and location to the Auditorium Property is generally reckoned at five (5) per cent per annum of the value of the fee. On that basis, assuming the aforesaid valuations for purposes of taxation to represent the present values of the land, the annual rental value of the fee subject to the first Walker lease would be $97,013.40; to the second Walker lease $27,843.60; to the Peck lease $25,132.40; and to the two Studebaker leases $32,722.80; or an aggregate annual rental value of $182,712.20. The annual rental payable under the first Walker lease is $15,000, or $82,013.40 less than the annual rental value computed as above; under the second Walker lease $15,000, or $12,843.60 less than said computed annual rental value; under the Peck lease $14,000, or $11,132.40 less than said computed annual rental value; and under the two Studebaker leases $34,000, or $1,277.20 more than said computed annual rental value. The net excess of the aggregate computed annual rental values, on the basis of the percentage and valuations aforesaid, over the actual rents now payable under said leases is $104,712.20, which sum, capitalized on a five (5) per cent basis, which is the rate now customarily used for computing rentals under long-term ground leases in that part of the City of Chicago where the Auditorium Property is situated, would give $2,094,244

as the present value of your orator's leasehold interests aforesaid, taken separately, and based on the difference between the present rental value of said several properties and the aggregate rents now payable under said leases. The rental value of said Auditorium Property, unimproved and unencumbered, taken as a unit for building purposes, is substantially greater than the aggregate rental value of the properties taken separately as aforesaid. Your orator does not present the foregoing figures as a conclusive determination of the value of its leasehold interests, but is informed and believes, and therefore alleges the fact to be, that they understate rather than overstate such value.

28 16. In order to meet the modern demands of cost of operation, building equipment and service, revenue is required to an extent greatly in excess of any that can possibly be realized from said building, either in its present condition or in any condition to which the present structure can be brought. Such revenue can be realized only from a building of greatly increased height, which will provide the maximum obtainable number of floors with the maximum amount of floor space, and such a building would require a modern steel-skeleton structure, supported on caisson foundations, and carried to the maximum height now allowed by law; accordingly, the only means whereby an adequate increase in revenue commensurate with the value of said leasehold interests can be derived from said property is through the construction of a new building thereon. The present building is now thirty-five years old, and is not only obsolete in its construction for the foregoing reasons, but also obsolete, uneconomical and depreciated in the other respects hereinafter in this paragraph set forth. In the first place, the general construction of said building consists of heavy enclosing walls of masonry with a skeleton interior construction of cast-iron columns and steel or wrought-iron trusses. Again, there has occurred a large amount of settlement in said structure, amounting in some places to twenty-two inches; the maximum of settlement has occurred under the heavy masonry walls, while the skeleton interior construction has, by comparison, settled to a much less extent; and these local differences in settlement have created a distortion in the interior skeleton construction which has resulted in the fracturing of various struts and connections in the framework of said interior construction and in the cracking of masonry, plaster and other finished surfaces. By reason of the fact that most of the

metal used in said interior construction is iron, further fractures are likely to occur. If the present building is re-
29 tained on the property it will continue to deteriorate until before many years shall have elapsed it will become unsafe and unsanitary on accounts of defects inherent in its character and construction, so that, as your orator is advised and believes, the municipal authorities of the City of Chicago will require said building to be pulled down or so extensively and radically altered by the removal and reconstruction of substantial parts thereof as to make the resulting improvement more obsolete and unremunerative than the one now standing upon said property; and when such stage of deterioration shall have been reached, it will not be possible to make said building safe and comfortable to the municipal regulations except at a cost wholly unjustifiable and prohibitive. If the defects of said building were confined to matters of arrangement, plumbing, heating, water supply, elevators and lighting, they might be remedied by replacements of more modern character, but as a matter of fact, the fundamental defects are those of inadequate construction and engineering design, and these defects are of so radical a character as to be fatal to the continued existence of the present structure, whether in its present condition or with extensive replacements or alterations, as a profitable or self-supporting business enterprise, and there is no way in which the present building could be altered, reconstructed or remodeled so as to yield enough increased income to meet the necessary interest charges, requirements and expenses of procuring the funds without which such alteration, reconstruction or remodeling would be impossible. Portions of said building are used for hotel and office purposes, and by reason of the fact that the masonry-bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas are too small to afford sufficient light for office and hotel space in said building, and the thickness of said bearing walls has
30 necessitated deep window reveals which cut down the floor space and further interfere with the lighting thereof. The finishing materials used in said building differ so greatly in kind, quality and color from those in use at the present time as to give said building an old-fashioned and out-of-date appearance. The elevators in said building, which are the principal means of access to the office and hotel space, while considered efficient when installed, are of a now

obsolete hydraulic type and are not adapted to present requirements with respect to character, mechanism, convenience, speed or safety, and said elevators are also inefficient and inadequate in number, size and distribution. The portion of said building now used as a hotel is not adapted in size, arrangement or distribution of rooms, bathrooms and corridors to meet modern demands. Furthermore, notwithstanding large expenditures thereon made by your orator, the plumbing, drainage and water-supply system of said building are inadequate, antiquated and unsound, and, as your orator is informed and believes, no amount of care and attention will insure their continued sanitary condition. The heating system of said building is also obsolescent with respect to arrangement and efficiency; and in spite of replacements and repairs of considerable magnitude, the wiring system is likewise obsolescent. Owing to its depreciated condition as above set forth, and to the obsolescence of its construction, the value of said building, taken separately and apart from the ground on which it stands, does not at the present time exceed the amount, if any, that could be realized from it as salvage in case said building were wrecked.

17. The above described leasehold interests and the said building constitute together substantially all the assets of your orator, and the earnings therefrom have never been sufficient to enable your orator to declare a dividend on its capital stock except in the year 1893, when a dividend of one and
31 one-half per cent was declared and paid. With that exception your orator, during the entire period of its existence, has never paid any dividend to its stockholders and has with difficulty been able to pay the ground rent due under said leases, and the taxes, interest on bonded indebtedness and other expenses of operation, and to retire a small amount of its bonds. The following table correctly states the figures in your orator's books purporting to show the net profit or net loss of your orator's business for each year, including such sums as have been charged on said books for depreciation:

Year	Depreciation	Loss	Profit
1891			$72,322.36
1892		$ 5,046.83	
1893			231,039.05
1894		28,201.79	
1895		28,597.25	
1896			14,686.96
1897		8,240.94	
1898			3,321.49
1899			9,276.33
1900	$ 51,833.75		18,496.60
1901	29,363.37	10,464.48	
1902	2,825.00		27,571.54
1903	7,655.76		33,728.64
1904			13,513.24
1905			52,813.38
1906			58,231.07
1907			13,736.20
1908	17,168.12		15,806.13
1909			21,593.52
1910		36,888.22	
1911		19,290.58	
1912			39,194.23
1913			34,185.36
1914			24,096.57
1915			28,585.54
1916	70,000.00	22,519.38	
1917			19,153.51
1918	27,619.27	11,589.99	
1919	108,041.79	4,302.02	
1920	97,790.84	12,266.20	
1921	94,890.03	45,186.40	

32 The amounts, however, charged off for depreciation in the foregoing table are wholly inadequate to represent the actual depreciation in value of the improvements upon said Auditorium Property, and the above figures showing the book entries relating to such depreciation are given here solely for the purpose of indicating the illusory character of any profits appearing from time to time to have been derived from said property, and of showing that such paper profits appear only because of the failure to charge off from time to time an adequate amount of actual depreciation, due not alone to ordinary wear and tear, but much more to obso-

lescence and the unsuitableness of the building to modern conditions in view of the great advance in the art of building construction. In the full and actual depreciation of the said building at the present time be taken into consideration, substantially and only value left with which to liquidate the principal of the bonded indebtedness of your orator, or to return to the stockholders any part of the investment represented by its capital stock, is the value of its leasehold interests above described, that value being fairly represented by the difference between (1) the present annual rental value of the fee, unimproved and unencumbered, and (2) the ground rentals accruing from said leasehold interests to the owners of the fee of said property.

18. The general taxes on the Auditorium Property have increased as follows since the creation of said leasehold interests:

1888	$ 3,555.90	1905	$43,690.15
1889	5,517.92	1906	42,282.24
1890	22,707.78	1907	55,501.88
1891	23,139.62	1908	48,944.63
1892	26,074.38	1909	48,489.02
1893	24,480.90	1910	46,466.47
1894	25,000.00	1911	59,819.18
1895	32,735.04	1912	52,223.13
1896	29,114.25	1913	61,369.14
1897	33,466.43	1914	58,023.81
1898	31,452.82	1915	61,064.29
1899	28,000.00	1916	49,075.18
1900	46,396.90	1917	73,255.43
1901	41,801.09	1918	69,682.00
1902	30,148.40	1919	93,264.54
1903	37,627.79	1920	101,176.96
1904	41,086.50	1921	138,531.67
		1922	145,289.25

Owing to the progressive increase of the burden of taxes payable by your orator as shown by the foregoing figures, as well as to other circumstances herein referred to, the return from said property, over and above taxes and operating expenses, is insufficient to meet your orator's obligations as they accrue.

19. The time has now accordingly arrived when your orator is no longer able to pay the interest on its outstanding bonded indebtedness out of the earnings of said building and

leasehold interests, which are its only available resources for that purpose, and it is in danger of losing its entire capital stock, property and assets through foreclosure proceedings instituted by or on behalf of the holders of its outstanding bonds, who, if they thereby acquired such leasehold interests, might be able to protract the life of said building through a lingering period of decay, during which they would realize little if anything over and above the ground rents, and such a result would be disastrous to everybody except the lessors, who on their part would be far better protected by the adequate improvement of the property. The highest and
34 best use of said property, at the present time and for many years to come, and the only use which can avert financial disaster, is one involving, as above stated, the construction of a new building of greatly increased height and capacity. Any building adequate to those requirements would necessarily be a modern steel-skeleton structure carried to the maximum height now permitted by law and supported on caisson foundations. Such a building, costing between ten million dollars ($10,000,000) and fifteen million dollars ($15,000,000), is indispensable to enable your orator to realize a sufficient return upon the actual value of its said leasehold interests to protect your orator and its bondholders from heavy financial loss.

20. To avert such loss, and the forfeiture of the leasehold interests aforesaid, your orator desires and proposes to realize the full value of its said leasehold interests by removing the present building and improvement from said Auditorium Property, and by erecting in its place an adequate modern steel-construction building at a cost of not less than ten million dollars ($10,000,000), adapted for a hotel, auditorium and safety deposit vaults. About forty-five (45) per cent in value of said proposed improvement would stand upon the Walker property fronting on Michigan avenue; about twenty-nine (29) per cent upon the Walker property fronting on Wabash avenue; about ten (10) per cent upon the Peck property; and about fifteen (15) per cent upon the Studebaker property. Plans are now under consideration by your orator for the erection of a building of the character and at the cost aforesaid, representing the highest type of modern construction and arrangement, and occupying the entire site of the Auditorium Property, and your orator is prepared to undertake and complete such a new improvement, and is able to obtain the necessary financial backing

to do so. Your orator is ready and willing, and hereby offers, before carrying out said plans and before removing the present building, to give such security as is equitable, and as shall be ordered by the court, for the erection and completion of a new improvement or improvements of the character above defined upon all of the ground now constituting the Auditorium Property, and to comply with any further equitable terms or conditions by the court prescribed, to the end that the lessors or their successors and assigns shall continue to have at all times any and all protection which may be secured to them by the terms of their respective leases. Under the proper construction and interpretation of the terms, covenants and conditions of said several leases, your orator is fully empowered and has the right to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors or their successors and assigns, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement; but the defendants hereinafter named, or some of them, nevertheless claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants and conditions of said leases even though such removal be incidental to and a part of the erection of a new and better building upon the same property, and even though adequate security be offered and given to protect the lessors from any loss of value to the property which may occur while the old improvement is being wrecked and removed, and before the new improvement is completed; and such defendants claim, and said persons with whom your orator has to deal are fearful, that under the terms, covenants and conditions of the leases, if a destruction of the present improvement occurs or is attempted, even though that destruction be incidental to and a part of the act of erecting a new and better improvement on the same property after adequate security as aforesaid shall have been given, it will constitute waste and a ground of forfeiture of the leases. The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said

property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of the said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law. Your orator well hoped that the defendants owning or interested in the fee of said Auditorium Property would consent to the replacement of the present building by the new and more valuable improvement so as aforesaid contemplated, which would be manifestly beneficial to all parties interested in said leases, but said defendants, or some of them, have refused to give such consent, or to forego the claims constituting as aforesaid a cloud upon your orator's title, unless your orator would pay them large sums of money in addition to that which is payable to them by the terms of said leases.

21. Whether your orator has the right to remove the building now on said Auditorium Property and replace it with a better building, and if so upon what terms and conditions, is a question which, as between your orator and the defendants owning or interested in the fee of said property, presents a common issue of law and fact substantially identical with respect to the interests of the said several defendants. The interests of the bondholders secured by the
37 above-mentioned trust deed of The Corporation of the Fine Arts Building dated March 5, 1903, and recorded as Document No. 3382697, in the questions arising under this bill of complaint are substantially the same as the interests of the owners of the fee of the Studebaker property, and said bondholders are fully represented herein by the Illinois Trust and Savings Bank, as trustee under said trust deed. Your orator is informed and believes and therefore states the fact to be that the bondholders secured by the two mortgage deeds of trust aforesaid from your orator, recorded respectively as Documents No. 1058261 and 1693161, are favorably disposed to your orator's plans with reference to the construction of a suitable building in place of the one now standing on the Auditorium Property, but they are entitled to be heard upon the security to be given by your orator and the other terms, if any, prescribed by the court as a condition

of the removal of the present building. Said bondholders are, however, fully and adequately represented herein by the trustee under said mortgage deeds of trust, the said Illinois Trust and Savings Bank.

22. In and by each of the ground leases hereinabove described it is provided in substance that at the expiration of the term thereof an appraisal shall be made of the actual cash value of any and all buildings and improvements then upon the demised premises, and that the owner or owners of the fee shall and will purchase said buildings and improvements at their fair cash value determined as aforesaid, and that the lessee shall have a lien on said premises and improvements for the payment of the said value thereof when so ascertained. In order to remove such questions, if any, as may properly arise about the liability of the owners of the fee to purchase and pay for larger or more expensive buildings and improvements than are now upon said properties, your orator is willing and hereby offers, in case of the replacement by your orator of the present building by
38 larger or more costly improvements, to abide by any conditions which to the court shall seem equitable with respect to such provisions, and to waive, if and so far as such waiver shall be deemed by the court necessary or proper, its right and claim under the above mentioned provision of said leases to payment at the termination thereof for the said improvements; and your orator hereby consents that any provision to that effect deemed by the court to be conformable to equity and good conscience may be incorporated in any decree entered by the court in this cause.

23. Your orator therefore, being without remedy in the premises save in a court of equity, makes defendants to this its bill of complaint the said Ambrose Cramer and Mark Skinner Willing, as trustees under the last will and testament of Henry J. Willing, deceased, Mark Skinner Willing, Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.; also William A. Slater Jr., E. Halsey Malone and Charles Lewis Harrison, as trustees under the last will and testament of William A. Slater, deceased, Ellen B. Slater, William A. Slater, Jr., John Fox Slater, Eleanor Malone, Elena de Struve, Boris de Struve, and Adrian Malone; also Bayard Warren and Bayard Tuckerman, Jr., as trustees, Elizabeth Sears Warren, Bayard Warren, Jr., Lily Warren, Camilla Warren, Phyllis Sears Tuckerman, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert

Tuckerman; also Emily C. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as trustees under the last will and testament of Charles A. Chapin, deceased, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Charlotte Gardiner Robertson, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Henry Kent Chapin, Henry Kent Chapin, Jr., Chester Crandall Chapin, Charles A. Chapin, Ruby Cha-
39 pin Pitner, Lowell Mead Chapin, Elizabeth Chalifoux Chapin, Coolidge Mead Chapin, Charles Douglas Chapin, and Illinois Trust and Savings Bank, as trustee under a certain trust deed from The Corporation of the Fine Arts Building dated March 5, 1903, and recorded in the office of the recorder of Cook County, Illinois, in Book 8241 of Records, at page 43, as Document No. 3382697, and as representative of the legal holders and owners of all bonds secured by said trust deed; also Illinois Trust and Savings Bank, as trustee under two certain mortgage deeds of trust from Chicago Auditorium Association, one dated February 1, 1889, and recorded in the office of the recorder of Cook County, Illinois, in Book 2515 of Records, at page 61, as Document No. 1058261, and the other dated February 1, 1892, and recorded in said recorder's office in Book 3916 of Records, at page 145, as Document No. 1693161, and as representative of the legal holders and owners of all bonds secured by said mortgage deeds of trust; and your orator prays that said defendants and each of them may be required fully and truly to answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived; that in accordance with the facts hereinabove stated certain of the defendants may be adjudged and decreed to represent for the purposes of this cause all persons whether in being or not who have or may hereafter have any interest in said Auditorium Property or any part thereof under or by virtue of any of the several trusts hereinabove mentioned; that a guardian or guardians *ad litem* may be appointed for the infant defendants above named; that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right

on the part of your orator to tear down and remove any
40 and all buildings which for the time being may be upon said premises, upon giving proper security as the court may direct, all as part of the act of erecting upon said premises a new, suitable and more valuable building and improvement, and one not in any way impairing the security of the lessors in said several leases or of their assigns or successors; that the court will also adjudge and determine what security shall be given by your orator to the Illinois Trust and Savings Bank, as trustee under the several trust deeds to it above described, to afford said trustee and the bondholders whom it represents adequate protection until the new and more valuable building shall have been completed; that the court will likewise, upon your orator giving such security as the court may direct for the protection of the defendants herein, enjoin and restrain the defendants interested in the fee of said properties as owners or otherwise from declaring or attempting to declare any forfeiture of any leasehold interest owned or held by your orator in which said defendants or any of them are interested as aforesaid, on account of any removal or destruction of the building or improvements upon the land subject to said leases; that said defendants may also be restrained and enjoined from taking any steps to prevent your orator from tearing down or removing the present building or improvement located upon any leasehold interest now vested in your orator in which the defendants or any of them are lessors or the assigns or successors of or interested under the original lessors; and that your orator may have such other and further or different relief in the premises as the nature of the case may require.

24. And may it please your Honors to grant unto your orator the writ of summons in chancery issued out of and under the seal of this Honorable Court, directed to the sheriff of the County of Cook in the State of Illinois, commanding him that he summon the defendants above named to
41 appear before this Honorable Court on the first day of the next March term thereof, to be held at the court house in the City of Chicago in the County of Cook aforesaid, then and there to answer this bill, and to abide by such order and decree as to your Honors shall seem meet and agreeable to equity and good conscience.

CHICAGO AUDITORIUM ASSOCIATION,
By R. FLOYD CLINCH,
Its President.

FISHER, BOYDEN, KALES & BELL,
Solicitors for Complainant.

42 EXHIBIT 1.

"A"

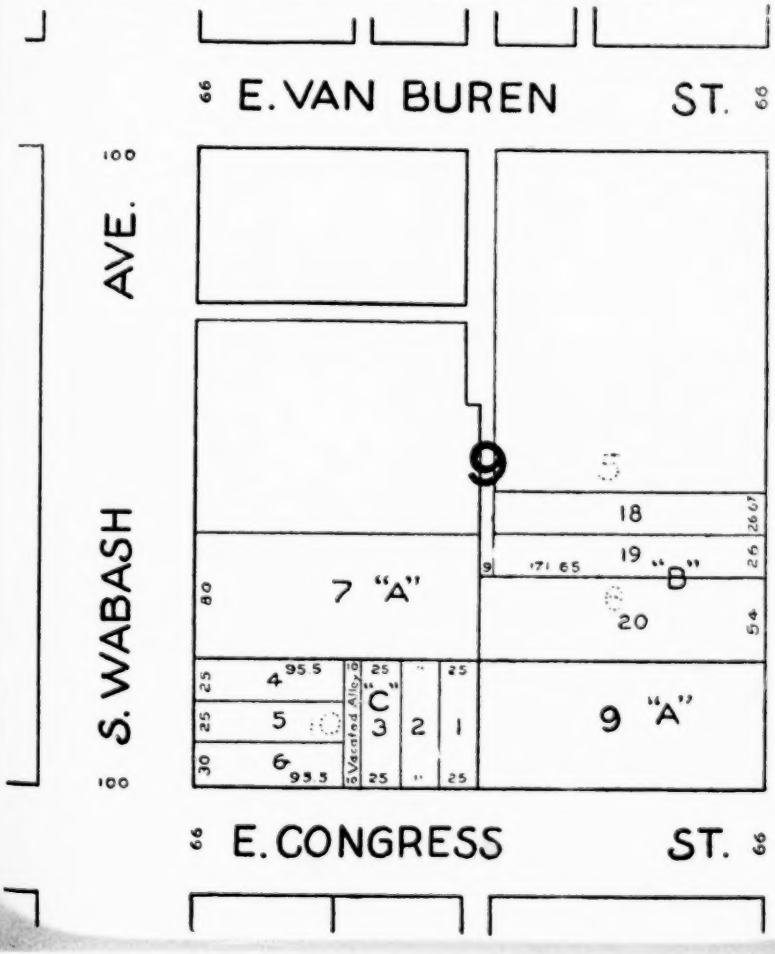
FRACTIONAL SECTION 15 ADDITION TO CHICAGO
of Fractional Section 15 T. 39 N. R. 14 E. of 3rd P. M.

"B"

Assessor's Division of Lots 1, 2, 3, 4, 5 and 8 in
Block 9 in Fractional Section 15 Addition to Chicago, etc.

"C"

Ely and Reynolds' Subdivision of Lot 10 in Block 9
in Fractional Section 15 Addition to Chicago, etc.



43 EXHIBIT 2.

THIS INDENTURE, made this seventeenth day of January in the year of our Lord one thousand eight hundred and eighty-seven (1887) between WIRT D. WALKER of the City of Chicago, County of Cook, and State of Illinois, party of the first part, and the CHICAGO AUDITORIUM ASSOCIATION, a corporation organized by and doing business under the laws of the State of Illinois, party of the second part,

WITNESSETH: That the said party of the first part, in consideration of the rents hereinafter reserved, and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns to be kept, performed and fulfilled, hath demised and leased, and doth by these presents demise and lease unto the said party of the second part, its successors and assigns, all those premises situate and being in the City of Chicago, in the County of Cook and State of Illinois, known and described as follows, to wit: Lot Nine (9) and the South Fifty-four (54) feet of Lot Eight (8) in Block Nine (9) and Sub-Lot One (1) of Ely & Reynolds' Subdivision of Lot Ten (10) in Block Nine (9), all in Fractional Section Fifteen (15) Addition to Chicago; said land fronting East on Michigan Avenue One Hundred and Thirty-four (134) feet more or less, and fronting South on Congress Street Two Hundred and Five (205) and 65-100 feet more or less:

TO HAVE AND TO HOLD the above described premises with the rights, privileges, easements and appurtenances there unto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine (99) years from and after the first day of August in the year of our Lord one thousand eight hundred and eighty-six (1886), that is to say, from the first day of August in the year of our Lord one thousand eight hundred and eighty-six (1886) for, during and until the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985), if the said lessor, his heirs or assigns, shall not elect to determine the term sooner for nonpayment of rent or breach of covenant, yielding and paying rent therefor as hereinafter set forth.

And the said party of the second part covenants and agrees to and with the said party of the first part, to forthwith
44 begin to build on said premises a substantal and solid fireproof building of brick, stone, iron, steel and tile, and

such other materials as are necessary and usual in fireproof buildings in the City of Chicago, the same to be in all respects in accordance with the building ordinances of the City of Chicago, and to cost not less than the sum of Four Hundred and Seventy-five Thousand Dollars ($475,000); and that it will carry on and prosecute the erection of said building with all reasonable despatch and have the same completed before the first day of August in the year of our Lord one thousand eight hundred and eighty-nine (1889), said building in the character of the materials to be used in its construction, to be as follows:

All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fire-proofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part.

Said party of the second part, in consideration of the leasing of the premises aforesaid by the said party of the first part to said party of the second part, doth hereby covenant and agree to and with the said party of the first part, to pay to the said party of the first part rent for said demised premises as follows, viz: For the first year of said term, to wit, from the first day of August, in the year of our Lord one thousand eight hundred and eighty-six (1886) to and until the first day of August in the year of our Lord one thousand eight hundred and eighty-seven (1887) one dollar, the receipt whereof is hereby acknowledged. For the second year of said term, to wit, from the first day of August in the year of our Lord one thousand eight hundred and eighty-seven (1887) to and until the first day of August in the year of our Lord one thousand eight hundred and eighty-eight (1888), a sum equal to five (5) per cent of Two Hundred and Eleven Thousand Seven Hundred and Fifty Dollars ($211,750), or Ten Thousand Five Hundred and Eighty-seven Dollars and Fifty Cents ($10,587.50), paid in advance upon the execution and delivery of this lease. For the next eighteen (18)
45 years of said term, that is to say, from the first day of August in the year of our Lord one thousand eight hundred and eighty-eight (1888) to and until the first day of

August in the year of our Lord one thousand nine hundred and six (1906), a yearly rent equal to five (5) per cent of Two Hundred and Eleven Thousand Seven Hundred and Fifty Dollars ($211,750) or Ten Thousand Five Hundred and Eighty-seven and Fifty One-hundredths Dollars ($10,587.50) in gold coin of the United States; such yearly rent to be paid in four equal quarterly installments, each for the sum of Two Thousand Six Hundred and Forty-six and Eighty-eight Hundredths Dollars ($2646.88) on the fifteenth day of each of the months of October, January, April and July, in each and every year during said period of eighteen (18) years. And it is mutually covenanted and agreed by and between the parties hereto, that the party of the second part shall pay as rent for each and every year of the residue of said term of ninety-nine (99) years, that is to say, for each and every year from the first day of August in the year of our Lord one thousand nine hundred and six (1906) to and until the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985), a sum of money equal to six per cent of the fair cash value of said demised premises exclusive of improvements placed thereon by said lessee, its successors or assigns; said fair cash value to be determined in the manner hereinafter mentioned. PROVIDED, HOWEVER, that in no event shall the rent for said demised premises for any year be less than Ten Thousand Five Hundred and Eighty-seven and Fifty-hundredths Dollars ($10,587.50); and in case six per cent of the fair cash value of said demised premises shall, at any time, not equal or exceed Ten Thousand Five Hundred and Eighty-seven and Fifty-hundredths Dollars ($10,587.50), then and in such case the yearly rent of said demised premises shall be Ten Thousand Five Hundred and Eighty-seven and Fifty-hundredths Dollars ($10,587.50) for the period during which six per cent of the value of said premises shall not equal or exceed Ten Thousand Five Hundred and Eighty-seven and Fifty-hundredths Dollars ($10,587.50). The yearly rental shall in all cases be paid in four equal quarter-yearly installments on the fifteenth day of each month of October, January, April and July of each and every year during said term, at such place in the City of Chicago as said lessor, his heirs or assigns, shall from time to time previously designate, and in default of such des-
46 ignation, then at said demised premises. Said rent shall in all cases be paid in gold coin equal in weight and fineness to the present standard coin of the United States or its

equivalent in value, and all appraisals made under the provisions of this lease, for the purpose of fixing the amount of said rent, shall be made in like gold coin.

And it is mutually agreed between the parties hereto, that in order to fix the rent above reserved and agreed to be paid for the residue of said term, beginning with August first in the year of Lord one thousand nine hundred and six (1906), to the end thereof, the fair cash value of said demised premises as hereinbefore specified, on the first day of August in the year of our Lord one thousand nine hundred and six (1906), shall be taken and considered as the said fair cash value thereof, for the ten years next ensuing thereafter, inclusive of said day, and so in like manner the said fair cash value of said demised premises on the first day of the month of August, which shall be in every tenth year thereafter, during the continuance of said term, shall be taken and considered as the said fair cash value thereof, for the ten years next ensuing thereafter, and inclusive of every such first day of August. So that the fair cash value of said demised premises, as before specified, on the first day of August in the year of our Lord One Thousand Nine Hundred and Six (1906), and on the first day of the month of August, which shall be in every tenth year thereafter, (that is to say in the years one thousand nine hundred and sixteen (1916), one thousand nine hundred and twenty-six (1926), one thousand nine hundred and thirty-six (1936), one thousand nine hundred and forty-six (1946), one thousand nine hundred and fifty-six (1956), one thousand nine hundred and sixty-six (1966), and one thousand nine hundred and seventy-six (1976), shall be the basis whereby the yearly rent to be paid for said demised premises shall be fixed in amount for the period of every ten (10) years next ensuing, and inclusive of every such first day of August, subject, however, to the provision hereinbefore contained, that the annual rent shall in no year be less than Ten Thousand Five Hundred and Eighty-seven and Fifty-hundredths Dollars ($10,587.50); and also subject to the further provision that this provision of the lease shall in no wise be construed as extending
47 this lease beyond the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985).

It is further mutually covenanted and agreed between the parties hereto that in order to ascertain the said fair cash value of said demised premises as before specified, at each

of the above dates, an appraisal thereof shall be made within the period of sixty (60) days immediately preceding each of said dates by appraisers selected in the following manner, viz: the party or parties then interested on either part hereto shall, not exceeding ninety (90) days prior to each of said dates, select a competent and disinterested person as appraisor, who shall be at the time a resident of the said County of Cook, and the owner in fee of real estate in that part of Chicago bounded by the Chicago River on the north and west, Lake Michigan on the east, and Peck Court on the south, and not related to any of the parties in interest by consanguinity or affinity, and notify the party then interested on the other part hereto, of such selection; whereupon the other party shall, within fifteen (15) days thereafter, select another person of like character and qualification as appraisor, and notify the party making the first selection of such second selection or appointment; and in case the party receiving such notice of such first selection of an appraisor shall not, within fifteen (15) days, select an appraisor as above provided, and notify the other party, the party having given such notice may select a second appraisor of like qualifications, and the two persons chosen as appraisors as above provided shall select a third appraisor, of like character and qualifications as above; or if the two appraisors selected as aforesaid cannot agree upon such third appraisor, either of the parties to this lease, or the party or parties who shall have succeeded to the interest of either of the parties under this lease, shall have the right to apply to any judge of any court having chancery jurisdiction within said County of Cook, for the appointment of a third appraisor, and any judge to whom such application shall be made, upon satisfactory evidence being furnished him that ten (10) days' notice of such application has been given by the party making the application to the other party in interest under this lease, or to the appraisor selected by such other party, shall have the power to appoint a third person, who shall have the same qualifications, powers and duties as though he had been selected by the two appraisors first chosen.

48 It shall not be incumbent upon any appraisors selected under the provisions of this lease to give any notice of the time and place of holding their meetings, or to hear any evidence or arguments, and no appraisement shall be invalid by reason of not having been made within the time provided by this lease and the award in writing under oath of said

appraisors, or a majority of them, of the then value of said demised premises, exclusive of improvements thereon, shall be binding upon the parties to this lease, and all parties claiming under them, for the purpose hereinbefore specified. In case a person selected to act as appraisor shall neglect or refuse to serve, or be unable to act, then the party appointing him shall forthwith appoint another person in his place, with like qualifications, powers and duties, and if the person so appointed shall negleft, refuse, or be unable to serve, another person shall be selected in like manner to act in his place, and so on until a person shall be appointed appraisor able and willing to act. All expenses of such appraisal, including a reasonable compensation to the appraisors, shall be borne equally by the parties hereto.

IT IS FURTHER MUTUALLY AGREED between the parties hereto, that if for any cause whatever a valid award shall not be made and completed before the expiration of ninety days after the beginning of the time or period for which if duly made it would fix the value of said demised premises as aforesaid, then any person or persons at the time interested upon either part or side hereto, shall have the right and be entitled to apply to any court of record in said County of Cook to have the said value ascertained, and the value of said premises, when determined and ascertained by the judgment or decree of said court, shall be binding upon all parties concerned for the purpose of ascertaining the rent to be paid under this lease, in all respects the same as though such value had been determined by appraisement under the provisions hereof, and until the value of said premises is so ascertained, either by appraisement or the judgment or decree of a court of record, or in some other legal and competent manner, the rent shall be paid regularly at the same rate at which the same shall have been paid for the ten years immediately preceding; and when said basis is fixed and ascertained, the excess of rent so paid, if any, shall be refunded to said party of the second part, or the deficiency in the rent so paid, if any, shall be made good, and the same shall be paid
49 when the next installment of rent falls due after said value shall be fixed.

And the said party of the second part further covenants and agrees to and with the said party of the first part, that said party of the second part will pay all water rates, and all taxes and assessments, general and special, ordinary and extraordinary, of every nature and kind whatsoever, which

may be levied, imposed, or assessed, during the continuance of this lease, on the premises herein demised, (not including, however, the taxes for the year 1886) or upon any building, addition or improvement of any kind which may, after the date of these presents and before the expiration of the term of this lease, be erected, made or placed thereon; whether such tax, rate or assessment shall be for city, county, state or other purpose whatever; and if any such rate, tax or assessment shall be paid by the said party of the first part, (said party of the first part being hereby authorized to pay any such tax, rate or assessment at any time after the same becomes due and payable) whether the same be so paid before or after sale or forfeiture, the amount or amounts so paid from time to time therefor shall be paid by said second party with eight per cent interest thereon to said party of the first part, when the next installment of rent falls due after any such payment; and all receipts taken for any and all payment or payments, whether made by one party or the other, shall be made out in the name of the said party of the first part or the parties who shall have succeeded to his interest in said premises, and which said receipts shall be delivered over to said party of the first part, or those claiming under him, upon demand. It is, however, expressly understood, covenanted and agreed by and between the parties hereto, that the general taxes for the year 1886 shall be paid by the party of the first part, and that the general taxes for the year 1887 shall be paid as follows: seven-twelfths thereof by the party of the first part, and five-twelfths thereof by the party of the second part; and that all special assessments of every sort, kind and description, confirmed after the date of this lease, upon the said premises, or any portion thereof, shall be paid by said party of the second part.

Said party of the second part further covenants and agrees that it will not sell, assign or convey this lease, or the term thereby created, or its interest in said premises above described, unless the assignee or assignees, purchaser or purchasers, shall contemporaneously, and at the time of such sale or assignment, execute and deliver to said party of the first part, a written instrument, duly sealed and acknowledged, by which such assignee or purchaser shall accept and assume all the terms, covenants, agreements and obligations of this lease on the part of the second party hereto, and become bound to comply therewith and to keep and perform all covenants and agreements herein contained to be kept and

performed on the part of the second party hereto. And it is further covenanted and agreed that every assignee or purchaser shall be subject to the same terms and conditions as to any assignment or sale by him, as is above provided in relation to such first sale or assignment, and also to all the covenants, agreements, provisions and conditions in this lease contained.

And it is further covenanted and agreed by and between the parties hereto, that the said party of the second part, and every assignee under it, shall be liable for and subject to all the covenants, agreements, provisions and conditions herein contained, until the expiration of the term hereby demised, notwithstanding any sale or assignment of its, his, or their interest in this lease, and in the premises hereinbefore described. It is expressly understood, covenanted and agreed, however, by and between the parties hereto, that the leasehold interest hereby created may be conveyed by the party of the second part, by way of mortgage, or deed of trust in the nature of a mortgage, to secure an indebtedness, without compliance with the foregoing provisions of this lease relating to sale and assignments, but subject, however, to all the other provisions and covenants of this lease, and to the first lien of the party of the first part for rent accrued or to accrue under the terms of this lease.

The party of the second part further covenants and agrees that it will not use, or suffer or permit any other person to use any building or enclosure upon said premises or any part thereof, for any immoral or illegal purpose, or for any purpose or use in violation of the laws of the United States, or of the State of Illinois, or the ordinances of the City of Chicago.

And the said party of the second part further covenants and agrees to and with the said party of the first part, that if default shall at any time be made by said party of the second part in the payment of said rent, upon the day the
51 same becomes due and payable as aforesaid, or if default shall be made in either of the covenants respecting assignments, rebuilding or insuring, or in any of the covenants herein contained to be kept by the party of the second part, and such default shall continue six months after notice thereof in writing by the party of the first part, to the party of the second part, and also to such mortgagees as shall have notified said first party in writing of their interest and address, it shall and may be lawful for the party of the first part

at his election, to declare said term ended, and into said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other persons occupying in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and said premises to repossess and enjoy as in his first and former estate; and to distrain for any rent that may be due thereon, upon any property belonging to the party of the second part; meaning and intending hereby to give to the party of the first part a valid and first lien upon the leasehold interest or estate hereby created, and also upon any and all buildings, improvements and other property on said premises belonging to the party of the second part, as security for the payment of said rent in manner aforesaid, and at the time aforesaid, anything hereinbefore contained to the contrary notwithstanding; and if at any time said term shall be ended at such election of said party of the first part, as aforesaid, the party of the second part does hereby covenant and agree to surrender and deliver up said above described premises, with all buildings and improvements situated thereon, peaceably to said party of the first part, immediately upon the termination of said term as aforesaid, and without any compensation being paid for said buildings and improvements.

And the party of the second part further covenants and agrees to and with the party of the first part, that it will conform to all municipal ordinances and laws, and all other laws and ordinances affecting said premises and the sidewalks in front of and around said premises, and that it will save the party of the first part forever harmless from any penalty or damage charged or imposed for any violation of any of said laws or ordinances, and will further save said party of the first part, during the term of this lease, harmless and indemnified at all times against any loss, damage, cost or
52 expense in any way arising or growing out of the use of said premises under this lease, or in any way arising or growing out of any injury to person or property in or about said premises, or the buildings erected thereon, or the streets or sidewalks in front of or around the same.

And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper costs and charges, keep the buildings situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and

secure condition, and that it will keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease.

Said party of the second part further covenants and agrees that it will, on demand, from time to time, as the building progresses, insure any building or improvements that may be built or placed upon said premises in such companies as may be approved by said party of the first part, to the amount of not less than Sixty Thousand Dollars ($60,000), and keep the same so insured during the said term of ninety-nine (99) years. But in no case shall said buildings or improvements be insured for more than their full insurable value. A complete list of all insurance thereon shall, whenever demanded, be furnished said party of the first part; and the receipts for the premiums paid for such insurance for the current year shall be shown whenever demanded by the lessor. If said buildings, or any part thereof, shall at any time or times, during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in writing, and have the same rebuilt and ready for occupancy within two (2) years from such loss or destruction. And that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for and in respect of said insurance, shall be laid out and expended by it in rebuilding or repairing said building.

It is further mutually covenanted and agreed by the parties hereto, that policies of insurance upon the buildings and improvements upon said demised premises to the amount of Sixty Thousand Dollars ($60,000) shall at all times during the term of this lease, provide that the loss, if any, shall
53 be payable to the party of the first part, and shall be held by the party of the first part as collateral security for the rent and the building aforesaid, and said party of the first part, in case said buildings and improvements shall, at any time or times, be damaged or destroyed by fire, during the term of this lease, shall pay to said party of the second part so much of said insurance money as may be received by him on account of such loss or destruction, when and as soon as said party of the second part shall have rebuilt or repaired said buildings and improvements, or shall have expended

not less than Sixty Thousand Dollars ($60,000) in rebuilding and repairing the same, provided, however, that in no case shall said party of the second part be entitled to receive any of said insurance money from said party of the first part until it shall have expended all other insurance money that it may have received from all other insurance on said premises, in rebuilding and repairing the same, unless the said buildings shall be damaged less than twenty-five per cent, in which event the insurance money in the hands of said first party shall be used in paying the expense of repairing said buildings upon architect's certificates. And it is expressly agreed and covenanted by and between the parties hereto, that the party of the first part shall pay no interest on any such insurance money in his hands to the party of the second part, and that in case the party of the second part shall not have rebuilt or repaired the building or buildings injured or destroyed as aforesaid, within the two (2) years next ensuing after such destruction or injury, then and in that case all moneys received by said party of the first part on account of insurance as aforesaid, shall, at the election of said party of the first part, belong to the said party of the first part as liquidated and ascertained damages by reason of the failure of said party of the second part to rebuild or repair as hereinbefore provided, and not as a penalty, or in the nature thereof. And in the event that the term hereby demised shall be forfeited by reason of the failure to pay rent, or breach of other covenant, while said party o fthe first part shall have in his hands any such insurance money, then and in such case such insurance money shall belong to and be the property of said party of the first part.

It is further covenanted that in the event that said second party shall at any time fail to keep the improvement upon said premises insured as herein provided, then and in
54 such case said party shall have the right to take out policies of insurance thereon so as to have at all times the insurance thereon hereinbefore provided for, and all premiums paid by said first party on such policies of insurance, with interest thereon at eight per cent, shall be repaid to said first party by said second party with the installment of rent next falling due thereafter.

And it is further covenanted and agreed by and between the parties hereto, that in the event of the determination of this lease at any time before the expiration of the term of ninety-nine (99) years hereby demised, for the breach of

any of the covenants herein contained, then and in such case all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor; and no compensation therefor shall be allowed or paid to said lessee.

It is further covenanted and agreed by and between the parties hereto that within one year before the expiration of this lease, to wit, between the first day of August and the first day of November in the year of our Lord one thousand nine hundred and eighty-four (1984) an appraisal shall be made of the actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises (exclusive of and not including the value of the land or ground) at the time of such appraisal; said appraisal to be made by appraisers appointed and selected in the manner hereinbefore provided for the appointment and selection of appraisors to value the land demised for the purpose of fixing the rental to be paid under the terms of this lease.

It is further mutually agreed between the parties hereto, that if for any cause whatever a valid appraisal of the cash value of said buildings and improvements shall not be made and completed by appraisors appointed under the provisions hereof, on or before the first day of January in the year of our Lord one thousand nine hundred and eighty-five (1985), then any person or persons at the time interested upon either part or side hereto shall have the right and be entitled to apply to any court of record in said County of Cook to have said cash value of said buildings and improvements ascertained, and said cash value of said buildings and improvements, when determined and ascertained by the judgment or decree of such court, shall be binding upon all parties concerned in all respects the same as though such cash value had been determined by appraisement under the provisions hereof. In making said appraisement of the value of said improvements, the apraisers or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant. And the party of the first part covenants and agrees to and with the said party

of the second part, that he will, on the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985) purchase said buildings and improvements then on said demised premises at their fair cash value, determined as aforesaid; said purchase money to be paid in cash at said date. Said appraisal and the payment of said purchase money to be made in gold coin as hereinbefore provided for the appraisal and payment of rent.

And it is further covenanted and agreed by and between the parties hereto that in the event that the fair cash value of said buildings and improvements on said demised premises shall not have been ascertained and determined as herein provided, on or before the said first day of August in the year 1985, then and in such case, the said party of the second part shall have a lien on said premises and improvements for the payment of the said value of said improvements and buildings when ascertained (with interest thereon at the rate of six per cent per annum from the date when said first party shall have received possession thereof, until the same is paid), notwithstanding the surrender of the possession thereof to said party of the first part, upon the expiration of this lease. It being understood that in such case the possession of said buildings and improvements shall be surrendered to said party of the first part on the first day of August in the year 1985, without the payment of the value thereof, as hereinbefore provided. And it is further stipulated and agreed that unless the appraised value of said buildings and improvements shall be paid by said first party on the first day of August 1985, or as soon thereafter as the value of said buildings and improvements shall be ascertained and determined under the provisions hereof, then said party of the second part may at once file its bill to enforce the payment thereof and its lien therefor upon the said premises.

It is further covenanted and agreed between the parties
56 hereto that each party to this lease shall furnish to the other a name and place to which all notices provided for by this lease may be addressed; which name and place may be changed from time to time, by the respective parties and those claiming under them, and a delivery of a notice to the address so given shall be considered a good and sufficient service of such notice on the party furnishing such address and on all parties claiming an interest under such party.

It is further expressly agreed and covenanted by and be-

tween the parties hereto, that in no case shall said party of the first part be liable under any express or implied covenant of this lease for damages caused by, or arising from any defect or imperfection in the title of said party of the first part to the premises hereby demised, to an amount in excess of the rent paid to said first party for such period of time as said second party may be compelled by law to pay damages for occupying said demised premises to the person or persons adjudged to be the rightful owners thereof; but in case of the eviction, dispossession or ejectment of said second party from said demised premises by reason of any such defect or imperfection, then and in such case said party of the second part shall not be compelled thereafter to pay any further rent to the party of the first part.

It is further covenanted and agreed by and between the parties hereto that the party of the second part shall pay all costs and attorney's fees which may be incurred by said party of the first part in enforcing the covenants and agreements of this lease; and also that all the covenants, agreements, rights, privileges, conditions, specifications and recitals in this lease contained, shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, lessor and lessee, the same as if in every case expressed, and shall be construed as running with the land.

IN WITNESS WHEREOF The said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused these presents to be signed by its President, and its Corporate Seal to be hereunto affixed, duly attested by its Secretary, on the day and year first above written.

WIRT D. WALKER. (SEAL)
CHICAGO AUDITORIUM ASSOCIATION
By FERD. W. PECK
President.

(CORPORATE SEAL)

Attest:
ARTHUR F. TOWNE
Secretary.

57 EXHIBIT 3.

Articles of Agreement Made and entered into this ninth day of July, 1891, between the Chicago Auditorium Association, a corporation organized under the laws of the State of Illinois, the party of the first part, and Henry J. Willing, of the City of Chicago, party of the second part:

Witnesseth, That, whereas, Wirt D. Walker did by his Indenture of Lease, dated the 17th day of January, 1887, demise and lease to the said party of the first part the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to wit, Lot Nine (9) and the south fifty-four (54) feet of Lot Eight (8) in Block Nine (9), and Sub-lot One (1) of Ely & Reynolds' Subdivision of Lot Ten (10) in Block Nine (9), all in Fractional Section Fifteen (15) Addition to Chicago, said land fronting East on Michigan Avenue One Hundred and Thirty-four (134) feet, more or less, and fronting south on Congress Street two hundred and five and sixty-five hundredths (205.65) feet, more or less; of the term of ninety-nine (99) years, which said lease was recorded in the Recorder's Office of said Cook County in Book 2129, at page 183, as Document No. 863551; and

Whereas, the said party of the second part has become the owner in fee of the premises demised by said lease, subject to the said lease; and

Whereas, the parties hereto are desirous of modifying the terms and provisions of said lease as hereinafter set forth;

Now, therefore, In consideration of the premises it is hereby covenanted and agreed by and between the parties hereto as follows:

First: It is hereby covenanted by and between the said parties that the term demised by said lease shall be and the same is hereby extended for an additional term of One Hundred (100) years, so that the term thereby demised as modified by this Agreement shall expire on the first day of August in the year Two Thousand and Eighty-five (A. D. 2085), instead of the first day of August, A. D. 1985, as provided in said lease as originally drawn;

Second: It is hereby further covenanted by and between the parties hereto that the rent reserved and payable under the terms and provisions of said lease as modified by this agreement, for the premises thereby demised, shall be as
58 follows: for the period of five (5) years, commencing on the first day of August, 1891, and expiring on the 31st day

of July, 1896, the annual rent shall be Thirteen Thousand Five Hundred Dollars ($13,500), and from and after the 31st day of July, 1896, and until the expiration of said lease as modified and extended by this agreement, the annual rent reserved and payable for said demised premises shall be the sum of Fifteen Thousand Dollars ($15,000). The foregoing provisions in regard to the rent reserved and payable under said lease as hereby modified are in lieu of and take the place of the provisions of said original lease fixing the amount of rent payable thereunder, including all provisions relating to an appraisement of said demised premises for the purpose of fixing the amount of rent to be paid thereunder, and the annual rent for said demised premises under said lease as modified and extended by this agreement, shall be paid in equal quarterly installments in gold coin in all respects the same and at the same dates in each year as is provided in said original lease in regard to the rent therein reserved.

And it is further covenanted and agreed, by and between the parties hereto, that all the covenants, agreements, conditions and provisions of said original lease, except as hereby modified, shall be and continue in full force and effect until the final expiration of the term demised by said lease as modified and extended by this agreement.

Frances Skinner Willing joins in this agreement for the purpose of showing her assent to the same.

In Witness Whereof, the said party of the first part has caused this agreement to be executed in its corporate name by its Vice President and attested by its Secretary and its corporate seal to be hereunto affixed, and said party of the second part hath hereunto set his hand and seal the day and year first above written.

CHICAGO AUDITORIUM ASSOCIATION
By J. R. WALSH
2 *Vice President*

(Corporate Seal)

Attest:
CHAS. H. LUNT,
Secretary.

HENRY J. WILLING. (Seal)
FRANCES SKINNER WILLING (Seal)

59 State of Illinois } ss.
County of Cook. }

I, William B. McIlvaine, a Notary Public in and for said County, in the state aforesaid, do hereby certify that John R. Walsh and Charles H. Lunt, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as 2nd Vice President and Secretary of the Chicago Auditorium Association, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said Instrument as their free and voluntary act as 2nd Vice President and Secretary as aforesaid, and as the free and voluntary act of said Chicago Auditorium Association, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 11th day of July, A. D. 1891.

WILLIAM B. McILVAINE
Notary Public.

(Notarial Seal)

State of Illinois } ss.
County of Cook. }

I, William B. McIlvaine, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Henry J. Willing and Frances Skinner Willing, who are personally known to me to be the same persons whose names are subscribed to the foregoing Instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said Instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 11th day of July, A. D. 1891.

WILLIAM B. McILVAINE
Notary Public.

(Notarial Seal)

60 EXHIBIT 4.

This Indenture, Made this Seventeenth day of January in the year of our Lord, one thousand eight hundred and eighty-seven (1887) between Wirt D. Walker, of the City of Chicago, County of Cook, and State of Illinois, party of the first part, and the Chicago Auditorium Association, a corporation organized by and doing business under the laws of the State of Illinois, party of the second part,

Witnesseth, That the said party of the first part in consideration of the rents hereinafter reserved, and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns to be kept, performed and fulfilled, hath demised and leased and doth by these premises demise and lease unto the said party of the second part, its successors and assigns, all those premises situate and being in the City of Chicago, in the County of Cook and State of Illinois, known and described as follows, to wit: Lot seven (7), Block nine (9), and Sub-lot Four (4) of Ely & Reynolds' Subdivision of Lot Ten (10) in Block Nine (9), all in Fractional Section Fifteen (15) Addition to Chicago. Said land fronting west on Wabash avenue one hundred and five (105) feet more or less,

To Have and to Hold the above described premises with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine (99) years from and after the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-six, that is to say, from the first day of August in the year of Our Lord One Thousand Eight Hundred and Eighty-six, for, during and until the first day of August in the year of our Lord One Thousand Nine Hundred and Eighty-five, if the said lessor, his heirs or assigns, shall not elect to determine the term sooner for non-payment of rent or breach of covenant—yielding and paying rent therefor as hereinafter set forth.

And the said party of the second part covenants and agrees to and with the said party of the first part, to forthwith begin to build on said premises a substantial and solid fireproof building of brick, stone, iron, steel and tile, and such other materials as are necessary and usual in fireproof build-
61 ings in the City of Chicago, the same to be in all respects in accordance with the building ordinances of the City

of Chicago, and to cost not less than the sum of Two Hundred and Seventy-five Thousand Dollars ($275,000), and that it will carry on and prosecute the erection of said building with all reasonable dispatch and have the same completed before the first day of August, in the year of our Lord One Thousand Eight Hundred and Eighty-nine (1889). Said building in the character of the materials to be used in its construction, to be as follows:

All columns shall be of iron, stone or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta, or hollow tile, or like material; all beams, joists, and roofing beams and joists shall be iron or steel; all constructional floors shall be arches of hollow tile, or like material; all partitions shall be of brick or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the Auditorium in said building, however, may be built of such materials, and in such manner as may seem most expedient to party of the second part.

Said party of the second part in consideration of the leasing of the premises aforesaid by the said party of the first part, to said party of the second part, doth hereby covenant and agree to and with the said party of the first part, to pay to the said party of the first part rent for said demised premises as follows, viz: For the first year of said term, to-wit, from the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-six (1886) to and until the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-seven (1887) One Dollar, the receipt whereof is hereby acknowledged. For the second year of said term, to wit from the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-seven (1887) to and until the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-eight (1888) a sum equal to five per cent of Two Hundred and Eight Thousand, Two Hundred and Fifty Dollars, or Ten Thousand Four Hundred and Twelve Dollars and fifty one-hundredths of a dollar ($10,412.50) paid in advance upon the execution and delivery of this lease. For the next eighteen (18) years of said term, that is to say, from the first day of August in the year of our Lord One Thousand Eight Hundred and Eighty-eight (1888) to and until the first day of August in the year of our Lord One Thousand Nine Hun-
dred and Six (1906) a yearly rental equal to five per
62 cent. of Two Hundred and Eight Thousand Two Hundred and Fifty Dollars, or Ten Thousand Four Hundred

and Twelve Dollars and fifty one-hundredths of a dollar ($10,412.50) in gold coin of the United States; such yearly rent to be paid in four equal quarterly installments, each for the sum of Two Thousand Six Hundred and Three and twelve one-hundredths dollars ($2,603.12) on the 15th day of each of the months of October, January, April and July, in each and every year during said period of eighteen (18) years. And it is mutually covenanted and agreed by and between the parties hereto that the party of the second part shall pay as rent for each and every year of the residue of said term of ninety-nine (99) years, that is to say, for each and every year from the first day of August in the year of our Lord One Thousand Nine Hundred and Six (1906) to and until the first day of August in the year of our Lord One Thousand Nine Hundred and Eighty-five (1985) a sum of money equal to six per cent of the fair cash value of said demised premises, exclusive of improvements, placed thereon by said lessee, its successors or assigns; said fair cash value to be determined in the manner hereinafter mentioned. Provided however, that in no event shall the rent for said demised premises for any year be less than ten thousand four hundred and twelve and fifty one-hundredths dollars ($10,412.50); and in case six per cent of the fair cash value of said demised premises shall at any time not equal or exceed ten thousand four hundred and twelve and fifty one-hundredths dollars ($10,412.50) then and in such case the yearly rent of said demised premises shall be ten thousand four hundred and twelve and fifty one-hundredths dollars ($10,412.50) for the period during which six per cent of the value of said premises shall not equal or exceed ten thousand four hundred and twelve and fifty one-hundredths dollars ($10,412.50). The yearly rent shall in all cases be paid in four equal quarter-yearly installments on the 15th day of each month of October, January, April and July of each and every year during said term, at such place in the City of Chicago, as said lessor, his heirs or assigns shall from time to time previously designate, and in default of such designation then at said demised premises. Said rent shall in all cases be paid in gold coin equal in weight and fineness to the present standard coin of the United States, or its equivalent in value, and all appraisals made under the
63 provisions of this lease, for the purpose of fixing the amount of said rent shall be payable in like gold coin.

And it is mutually agreed between the parties hereto, that in order to fix the rent above reserved and agreed to be paid

for the residue of said term beginning with August 1st in the year of our Lord, one thousand nine hundred and six (1906), to the end thereof, the fair cash value of said demised premises as hereinbefore specified, on the first day of August, in the year of our Lord one thousand nine hundred and six (1906) shall be taken and considered as the said fair cash value thereof, for the ten years next ensuing thereafter, inclusive of said day, and so in like manner the said fair cash value of said demised premises on the first day of the month of August, which shall be in every tenth (10th) year thereafter during the continuance of said term, shall be taken and considered as the said fair cash value thereof, for the ten (10) years next ensuing thereafter, and inclusive of every such first day of August, so that the fair cash value of said demised premises, as before specified, on the first day of August in the year of our Lord one thousand nine hundred and six (1906) and on the first day of the month of August, which shall be every tenth (10th) year thereafter, (that is to say in the years one thousand nine hundred and sixteen (1916), one thousand nine hundred and twenty-six (1926), one thousand nine hundred and thirty-six (1936), one thousand nine hundred and forty-six (1946), one thousand nine hundred and fifty-six (1956), one thousand nine hundred and sixty-six (1966), and one thousand nine hundred and seventy-six (1976) shall be the basis whereby the yearly rent to be paid for said demised premises, shall be fixed in amount for the period of every ten (10) years, next ensuing, and inclusive of every such first day of August, subject however, to the provision hereinbefore contained, that the annual rent shall in no year be less than ten thousand four hundred and twelve and fifty one-hundredths dollars ($10,412.50); and subject to the further provision that this provision of the lease shall in no wise be construed as extending this lease beyond the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985).

It is further mutually covenanted and agreed between the parties hereto that in order to ascertain the said fair cash value of said demised premises as before specified, at each of the above dates, an appraisal thereof shall be made within the period of sixty (60) days immediately preceding each
64 of said dates by appraisors selected in the following manner, viz: The party or patries then interested on either part hereto, shall, not exceeding ninety (90) days prior to each of said dates, select a competent and disinterested person as

appraisor, who shall be at the time a resident of said County of Cook, and the owner in fee of real estate in that part of Chicago bounded by the Chicago River on the north and west, Lake Michigan on the east and Peck Court on the south, and not related to any of the parties in interest by consanguinity or affinity, and notify the party then interested on the other part hereto, of such selection; whereupon the other party shall, within fifteen (15) days thereafter, select another person of like character and qualification as appraisor and notify the party making the first selection of such second selection or appointment; and in case the party receiving such notice of such first selection of an appraisor shall not, within fifteen (15) days, select an appraisor as before provided, and notify the other party, the party having given such notice, may select the second appraisor of like qualifications, and the two persons chosen as appraisors as above provided, shall select a third appraisor of like character and qualifications as above; or if the two appraisors selected as aforesaid cannot agree upon such third appraisor, either of the parties to this lease or the party or parties who shall have succeeded to the interest of either of the parties under this lease, shall have the right to apply to any judge of any court having chancery jurisdiction within said County of Cook, for the appointment of a third appraisor, and any judge to whom such application shall be made, upon satisfactory evidence being furnished him that ten (10) days notice of such application has been given by the party making the application to the other party in interest under this lease, or to the appraisor selected by such other party, shall have power to appoint a third person, who shall have the same qualifications, powers and duties as though he had been selected by the two appraisors first chosen.

It shall not be incumbent upon any appraisors selected under the provisions of this lease to give any notice of the time and place of holding their meetings, or to hear any evidence or arguments, and no appraisement shall be invalid by reason of not having been made within the time provided by this lease; and the award in writing, under oath, of said appraisors, or a majority of them, of the then value of said demised premises, exclusive of the improvements thereon,
65 shall be binding upon the parties of this lease, and all parties claiming under them, for the purposes hereinbefore specified. In case a person selected to act as appraisor shall neglect or refuse to serve, or be unable to act, then the party

appointing him shall forthwith appoint another person in his place, with like qualifications, powers and duties, and if the person so appointed shall neglect, refuse or be unable to serve, another person shall be selected in like manner to act in his place, and so on, until a person shall be appointed appraisor able and willing to act. All expenses of such appraisal including a reasonable compensation to the appraisors shall be borne equally by the parties hereto.

It is further mutually agreed between the parties hereto, that, if for any cause whatever, a valid award shall not be made and completed before the expiration of ninety (90) days after the beginning of the time or period for which, if duly made, it would fix the value of said demised premises as aforesaid, then any person or persons at the time interested upon either part or side hereto, shall have the right and be entitled to apply to any court of record in said County of Cook to have the said value ascertained; and the value of said premises when determined and ascertained by the judgment or decree of said court shall be binding upon all parties concerned for the purpose of ascertaining the rent to be paid under this lease in all respects the same as though such value had been determined by appraisement unde rthe provisions hereof, and until the value of said premises is so ascertained, either by appraisement or the judgment or decree of a court of record or in some other legal and competent manner, the rent shall be paid regularly at the same rate at which the same shall have been paid for the ten years immediately preceding; and when said basis is fixed and ascertained the excess of rent so paid, if any, shall be refunded to said party of the second part, or the deficiency in the rent so paid, if any, shall be made good and the same shall be paid when the next installment of rent falls due after said value shall be fixed.

And the said part of the second part further covenants and agrees to and with the said party of the first part, that said party of the second part will pay all water rates and all taxes and assessments, general and special, ordinary and extraordinary, of every nature and kind whatsoever, which may be levied, imposed or assessed during the continu-
66 ance of this lease, on the premises herein demised, (not including however the taxes for the year 1886) or upon any building, addition or improvement of any kind which may, after the date of these presents and before the expiration of the term of this lease, be erected, made or placed thereon, whether such tax, rate or assessment shall be for city, county,

state or other purpose whatever; and if any such rate, tax or assessment shall be paid by the said party of the first part, (said party of the first part being hereby authorized to pay any such tax, rate or assessment at any time after the same becomes due and payable) whether the same be so paid before or after sale or forfeiture, the amount or amounts so paid from time to time therefor shall be paid by said second part with eight per cent interest thereon, to said party of the first part, when the next installment of rent falls due after any such payment; and all receipts taken for any and all payment or payments, whether made by one party or the other, shall be made out in the name of the said party of the first part or the parties who shall have succeeded to his interest in said premises, and which said receipts shall be delivered over to said party of the first part, or those claiming under him, upon demand. It is however expressly understood, covenanted and agreed by and between the parties hereto, that the general taxes for the year 1886 shall be paid by the party of the first part, and that the general taxes for the year 1887 shall be paid as follows: Seven-twelfths thereof by the party of the first part and five-twelfths thereof by the party of the second part; and that all special assessments of every sort, kind and description, confirmed after the date of this lease, upon the said premises or any portion thereof, shall be paid by said party of the second part.

Said party of the second part further covenants and agrees that it will not sell, assign or convey this lease or the term thereby created, or its interest in said premises above described, unless the assignee or assignees, purchaser or purchasers shall contemporaneously, and at the time of such sale or assignment, execute and deliver to said party of the first part a written instrument, duly sealed and acknowledged, by which such assignee or purchaser shall accept and assume all the terms, covenants, agreements and obligations of this lease on the part of the second party hereto, and become bound to comply therewith, and to keep and perform all covenants and agreements herein contained to be kept and per-
67 formed on the part of the second party hereto. And it is further covenanted and agreed that every assignee or purchaser shall be subject to the same terms and conditions as to any assignment or sale by him, as is above provided in relation to such first sale or assignment, and also to all covenants, agreements, provisions and conditions in this lease contained.

And it is further covenanted and agreed by and between the parties hereto, that the said party of the second part, and every assignee under it, shall be liable for and subject to all the covenants, agreements, provisions and conditions herein contained, until the expiration of the term hereby demised, notwithstanding any sale or assignment of its, his or their interest in this lease, and in the premises hereinbefore described. It is expressly understood, covenanted and agreed, however, by and between the parties hereto, that the leasehold interest hereby created may be conveyed by the party of the second part, by way of mortgage or deed of trust in the nature of a mortgage, to secure an indebtedness, without compliance with the foregoing provisions of this lease relating to sales and assignments, but subject, however, to all the other provisions and covenants of this lease, and to the first lien of the party of the first part for rent accrued or to accrue under the terms of this lease.

The party of the second part further covenants and agrees that it will not use, or suffer or permit any other person to use any building or enclosure upon said premises or any part thereof, for any immoral or illegal purpose, or for any purpose, or use in violation of the laws of the United States, or of the State of Illinois, or the ordinances of the City of Chicago.

And the said party of the second part further covenants and agreed to and with the said party of the first part, that if default shall at any time be made by said party of the second part in the payment of said rent, upon the day the same becomes due and payable as aforesaid, or if default shall be made in either of the covenants respecting assignments, rebuilding or insuring, or in any of the covenants herein contained to be kept by the party of the second part, and such default shall continue six months after notice thereof in writing by the party of the first part to the party of the second party (and also to such mortgagees as shall have notified said first party in writing of their interest and ad-
68 dress), it shall and may be lawful for the party of the first part, at his election to declare said term ended, and into said demised premises or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other persons occupying, in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and said premises to repossess and enjoy as in his first and former estate; and to distrain for any

rent that may be due thereon, upon any property belonging to the party of the second part; meaning and intending hereby to give to the party of the first part a valid and first lien upon the leasehold interest, or estate hereby created, and also upon any and all buildings, improvements and other property on said premises belonging to the party of the second part, as security for the payment of said rent as in manner aforesaid, and at the time aforesaid, anything hereinbefore contained to the contrary notwithstanding; and if at any time said term shall be ended at such election of said party of the first part, as aforesaid, the party of the second part, does hereby covenant and agree to surrender and deliver up said above described premises, with all buildings and improvements situated thereon, peaceably to said party of the first part, immediately upon the termination of said terms as aforesaid, and without any compensation being paid for said buildings and improvements.

And the party of the second part further covenants and agrees to and with the party of the first part that it will conform to all municipal ordinances and laws, and all other laws and ordinances affecting said premises and the sidewalk in front of and around said premises, and that it will save the party of the first part forever harmless from any penalty or damage charged or imposed for any violation of any of said laws, or ordinances, and will further save said party of the first part, during the term of this lease, harmless, and indemnified at all times against any loss, damage, cost or expense in any way arising or growing out of the use of said premises under this lease, or in any way arising or growing out of any injury to person or property in or about said premises, or the buildings erected thereon or the streets or sidewalks in front of or around the same.

And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper costs and charges, keep the buildings situated upon said demised premises, and all appur-
69 tenances belonging thereto, in good repair and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease.

Said party of the second part further covenants and agrees that it will on demand from time to time as the building progresses, insure any buildings or improvements that may be built or placed upon said premises, in such companies as may

be approved by said party of the first part, to an amount not less than Forty Thousand Dollars ($40,000), and keep the same so insured during said term of ninety-nine (99) years. But in no case shall said buildings or improvements be insured for more than their full, insurable value. A complete list of all insurance thereon shall, whenever demanded, be furnished said party of the first part; and the receipts for the premiums paid for such insurance for the current year, shall be shown whenever demanded by the lessor. If said buildings or any part thereof shall at any time or times during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before said fire happened, or such other plans as by the party of the first part shall be approved in writing and have the same rebuilt and ready for occupancy within two years from such loss or destruction. And that as often as said buildings or improvements shall be burned down or damaged by fire, all and every the sum or sums of money which shall be recovered or received by the party of the second part, for and in respect of said insurance shall be laid out and expended by it in rebuilding or repairing said building.

It is further mutually covenanted and agreed by the parties hereto, that policies of insurance upon the buildings and improvements upon said demised premises to the amount of Forty Thousand Dollars ($40,000) shall at all times during the term of this lease, provide that the loss if any, shall be payable to the party of the first part, and shall be held by the party of the first part as collateral security for the rent and the building aforesaid; and said party of the first part in case said buildings and improvements shall at any time or times, be damaged or destroyed by fire, during the term of this lease, shall pay to said party of the second part so much of said insurance money as may be received by him on account of such loss or destruction when and as soon as said party
70 of the second part, shall have rebuilt or repaired said buildings and improvements, or shall have expended not less than Forty Thousand Dollars ($40,000) in rebuilding and repairing the same, provided however, that in no case shall said party of the second part, be entitled to receive any of said insurance money from said party of the first part, until it shall have expended all other insurance money that it may have received from all other insurance on said premises in rebuilding and repairing the same, unless the said building

shall be damaged less than twenty-five per cent, in which event the insurance money in the hands of said first party shall be used in paying the expense of repairing said buildings upon architect's certificates. And it is expressly agreed and covenanted by and between the parties hereto, that the party of the first part shall pay no interest on any such insurance money in his hands, to the party of the second part, and that in case the party of the second part shall not have rebuilt or repaired the building or buildings injured or destroyed as aforesaid, within the two years next ensuing after such destruction or injury, then and in that case all moneys received by said party of the first part on account of insurance as aforesaid, shall at the election of said party of the first part, belong to said party of the first part, as liquidated and ascertained damages, by reason of the failure of said party of the second part to rebuild or repair as hereinbefore provided, and not as a penalty or in the nature thereof. And in the event that the term hereby demised shall be forefeited by reason of the failure to pay rent, or breach of any other covenant, while said party of the first shall have in his hands any such insurance money, then and in such case, such insurance money shall belong to and be the property of said party of the first part.

It is further covenanted that in the event that said second party shall at any time fail to keep the improvement upon said premises insured as herein provided, then and in such case said first party shall have the right to take out policies of insurance thereon so as to have at all times the insurance thereon hereinbefore provided for, and all premiums paid by said first party on such policies of insurance with interest thereon at eight per cent shall be repaid to said first party by said second party with the installment of rent next falling due thereafter.

And it is further covenanted and agreed by and between the parties hereto that in the event of the determination of this lease at any time before the expiration of the term
71 of ninety-nine (99) years hereby demised, for the breach of any of the covenants herein contained, then, and in such case, all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor; and no compensation therefor shall be allowed or paid to said lessee.

It is further covenanted and agreed by and between the parties hereto, that within one year before the expiration of

this lease, to wit, between the first day of August and the first day of November, in the year of our Lord one thousand nine hundred and eighty-four (1984) an appraisal shall be made of the actual cash value of any and all building and buildings, and any and all improvements that are then situate and standing upon said premises, (exclusive of and not including the value of the land or ground) at the time of such appraisal; said appraisal to be made by appraisors appointed and selected in the manner hereinbefore provided for the appointment and selection of appraisors to value the land demised for the purpose of fixing the rental to be paid under the terms of this lease.

It is further mutually agreed between the parties hereto that if for any cause whatever a valid appraisal of the cash value of said buildings and improvements shall not be made and completed by appraisors appointed under the provisions hereof, on or before the 1st day of January in the year of our Lord one thousand nine hundred and eighty-five (1985) then any person or persons at the time interested upon either part or side hereto shall have the right and be entitled to apply to any court of record in said County of Cook to have said cash value of said buildings and improvements ascertained, and said cash value of said buildings and improvements when determined and ascertained by the judgment or decree of such court shall be binding upon all parties concerned in all respects the same as though such cash value had been determined by appraisement under the provisions hereof. In making said appraisement of the value of said improvements, the appraisors or court shall take into consideration the suitableness of said improvements as to character and condition, to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant. And the party of the

first part covenants and agrees to and with the said party
72 of the second part that he will on the first day of August

in the year of our Lord one thousand nine hundred and eighty-five (1985) purchase said buildings and improvements, then on said demised premises, at their fair cash value determined as aforesaid; said purchase money to be paid in cash at said date. Said appraisal and the payment of said pur-

chase money to be made in gold coin as hereinbefore provided for the appraisal and payment of rent.

And it is further covenanted and agreed by and between the parties hereto, that in the event that the fair cash value of said buildings and improvements on said demised premises shall not have been ascertained and determined as herein provided on or before the said first day of August in the year one thousand nine hundred and eighty-five (1985) then and in such case the said party of the second part, shall have a lien on said premises and improvements for the payment of the said value of said improvements and buildings, when ascertained, (with interest thereon at the rate of six per cent per annum, from the date when said first party shall have received possession thereof until the same is paid), nothwithstanding the surrender of the possession thereof to said party of the first part, upon the expiration of this lease, it being understood that in such case, the possession of said buildings and improvements shall be surrendered to said party of the first part on the first day of August in the year one thousand nine hundred and eighty-five (1985), without the payment of the value thereof, as hereinbefore provided.

And it is further stipulated and agreed that unless the appraised value of said buildings and improvements shall be paid by said first party on the first day of August, 1985, or as soon thereafter as the value of said buildings and improvements shall be ascertained and determined under the provisions hereof then said party of the second part may at once file its bill to enofrce the payment thereof, and its lien therefor upon the said premises.

It is further covenanted and agreed between the parties hereto that each party to this lease shall furnish to the other a name and place to which all notices provided for by this lease may be addressed; which name and place may be changed from time to time, by the respective parties and those claiming under them, and a delivery of a notice to the address so given shall be considered a good and sufficient service of such notice on the party furnishing such address and on all parties claiming an interest under such party.

It is further expressly agreed and covenanted by and
73 between the parties hereto, that in no case shall said party of the first part be liable under any express or implied covenant of this lease, for damages caused by or arising from any defect or imperfection in the title of said party of the first part to the premises hereby demised, to an amount in

excess of the rent paid to said first party for such period of time as said second party may be compelled by law to pay damages for occupying said demised premises to the person or persons adjudged to be the rightful owners thereof; but in case of the eviction, dispossession or ejectment of said second party from said demised premises by reason of any such defect or imperfection, then and in such case, said party of the second part shall not be compelled thereafter, to pay any further rent to the party of the first part.

It is further covenanted and agreed by and between the parties hereto, that the party of the second part shall pay all costs and attorney's fees, which may be incurred by said party of the first part in enforcing the covenants and agreements of this lease; and also that all the covenants, agreements, rights, privileges, conditions, specifications and recitals in this lease contained, shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, lessor and lessee, the same as if in every case expressed, and shall be construed as running with the land.

In Witness Whereof, the said party of the first part has hereto set his hand and seal, and the said party of the second part has caused these presents to be signed by its President and its corporate seal to be hereunto affixed, duly attested by its Secretary, on the day and year first above written.

WIRT D. WALKER (Seal)
CHICAGO AUDITORIUM ASSOCIATION
By FERD. W. PECK,
President.

(Corporate Seal)

Attest:
ARTHUR F. TOWNE,
Secretary.

74 EXHIBIT 5.

Articles Of Agreement, Made and entered into this ninth day of July, 1891, between the Chicago Auditorium Association, a corporation organized under the laws of the State of Illinois, the party of the first part, and Henry J. Willing, of the City of Chicago, the party of the second part:

Witnesseth, That Whereas, Wirt D. Walker did by his indenture of lease, dated the 17th day of January, 1887, demise and lease to the said party of the first part the following described premises, situated in the City of Chicago, County of Cook and State of Illinois, to wit: lot seven (7) in Block nine (9) and Sub-lot four (4) of Ely & Reynolds' Subdivision of lot ten (10) in Block nine (9), all in Fractional Section Fifteen (15) Addition to Chicago, said land fronting West on Wabash Avenue one hundred and five (105) feet, more or less; for the term of ninety-nine years, which said lease was recorded in Book 2,147, page 11, as Document No. 863552, in the Recorder's Office of said Cook County: and

Whereas, the said party of the second part has become the owner in fee of the premises demised by said lease, subject to the said lease: and,

Whereas, the parties hereto are desirous of modifying the terms and provisions of said lease as hereinafter set forth:

Now, Therefore, In consideration of the premises, it is hereby covenanted and agreed by and between the parties hereto as follows:—

First:—It is hereby covenanted by and between the said parties that the term demised by said lease shall be and the same is hereby extended for an additional term of one hundred (100) years, so that the term thereby demised as modified by this agreement shall expire on the first day of August in the year two thousand and eighty-five (2085), instead of the first day of August, A. D. 1985, as provided in said lease as originally drawn.

Second:—It is hereby further covenanted by and between the parties hereto that the rent reserved and payable under the terms and provisions of said lease as modified by this agreement for the premises thereby demised shall be as follows: for the period of five (5) years, commencing on the
75 first day of August, 1891, and expiring on the 31st day of July, 1896, the annual rent shall be Thirteen Thousand

Five Hundred Dollars ($13,500), and from and after the 31st day of July, 1896, and until the expiration of said lease as modified and extended by this agreement, the annual rent reserved and payable for said demised premises shall be the sum of Fifteen Thousand Dollars ($15,000).

The foregoing provisions in regard to the rent reserved and payable under said lease as hereby modified are in lieu of and take the place of the provisions of said original lease fixing the amount of rent payable thereunder, including all provisions relating to an appraisement of the said demised premises for the purpose of fixing the amount of rent to be paid thereunder, and the annual rent for said demised premises under said lease as modified and extended by this agreement shall be paid in equal quarterly installments in gold coin in all respects the same and at the same dates in each year as is provided in said original lease in regard to the rent therein reserved.

And it is further covenanted and agreed, by and between the parties hereto, that all the covenants, agreements, conditions and provisions of said original lease, except as hereby modified, shall be and continue in full force and effect until the final expiration of the term demised by said lease as modified and extended by this agreement.

Frances Skinner Willing joins in this agreement for the purpose of showing her assent to the same.

In Witness Whereof the said party of the first part has caused this agreement to be executed in its corporate name by its Vice President and attested by its Secretary and its corporate seal to be hereunto affixed, and the said party of the second part hath hereunto set his hand and seal the day and year first above written.

CHICAGO AUDITORIUM ASSOCIATION,
By J. R. WALSH,
2 Vice President.

(Corporate Seal)

Attest:
CHAS. H. LUNT,
Secretary.

HENRY J. WILLING. (Seal)

FRANCES SKINNER WILLING (Seal)

76 State of Illinois, } ss.
County of Cook. }

I, William B. McIlvaine a Notary Public in and for said County, in the State aforesaid, do hereby certify that John R. Walsh and Charles H. Lunt who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument as 2nd Vice President and Secretary of the Chicago Auditorium Association, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act as Vice President and Secretary as aforesaid, and as the free and voluntary act of said Chicago Auditorium Association, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 11th day of July, A. D. 1891.

WILLIAM B. McILVAINE,
(Notarial Seal) *Notary Public.*

State of Illinois, } ss.
County of Cook. }

I, William B. McIlvaine, a Notary Public in and for said County, in the State aforesaid, do hereby certify, that Henry J. Willing and Frances Skinner Willing, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this 11th day of July, A. D. 1891.

WILLIAM B. McILVAINE,
(Notarial Seal) *Notary Public.*

77 EXHIBIT 6.

bit 6. This Indenture, made this twenty-fourth day of January in the year of our Lord, one thousand eight hundred and eighty-seven (1887) between Walter L. Peck, Clarence I. Peck and Ferd. W. Peck, of the City of Chicago, County of Cook, and State of Illinois, party of the first part, and the Chicago Auditorium Association, a corporation organized by and doing business under the laws of the State of Illinois, party of the second part,

Witnesseth, That the said party of the first part, in consideration of the rents hereinafter reserved, and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns, to be kept, performed and fulfilled, hath demised and leased, and doth by these premises demise and lease unto the said party of the second part, its successors and assigns, all those premises situate and being in the City of Chicago, in the County of Cook, and State of Illinois, known and described as follows, to-wit:

Sublots two (2), three (3), five (5), and six (6) of Ely and Reynolds' subdivision of lot ten (10) in block nine (9) in Fractional Section fifteen (15), Addition to Chicago, together with such portions of an alley, about ten (10) feet in width, beginning at Congress street and running north eighty (80) feet more or less along the west side of said sublot three (3), and also east of and abutting upon sublot four (4) and said sublots five (5) and six (6) of said lot ten (10), as adjoins or pertains to said sublots three (3), five (5) and six (6); said land fronting on Wabash avenue and Congress street, and being the northeast corner thereof.

To Have and to Hold, the above described premises with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine (99) years from and after the first (1st) day of August in the year of our Lord, one thousand eight hundred and eighty-six (1886)—that is to say, from the first (1st) day of August in the year of our Lord, one thousand eight hundred and eighty-six (1886) for during and until the thirty-first (31st) day of July in the year of our Lord, one thousand nine hundred and eighty-five (1985), if the said

lessors, their heirs or assigns, shall not elect to determine
78 the term sooner for nonpayment of rent or breach of covenant, yielding and paying rent therefor as hereinafter set forth.

And the said party of the second part covenants and agrees to and with said party of the first part to forthwith begin to build on said premises a substantial and solid fireproof building of brick, stone, iron, steel and tile, and such other materials as are necessary and usual in fireproof buildings in the City of Chicago, the same to be in all respects in accordance with the building ordinances of the City of Chicago, and to cost not less than the sum of Four Hundred Thousand Dollars ($400,000), and that it will carry on and prosecute the erection of said building with all reasonable dispatch, and have the same completed before the first day of August, in the year of our Lord, one thousand eight hundred and eighty-nine (1889). Said building in the character of the materials to be used in its construction to be as follows: All columns shall be of iron, stone or brick, and all iron and steel columns and girders shall be fireproof with a covering of porous terra-cotta or hollow tile, or like material; all beams, joists and roofing beams and joists shall be iron or steel; all constructional floors shall be arches of hollow tile or like material; all partitions shall be of brick or hollow tile; the roof shall be of iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such materials and in such manner as may seem most expedient to the party of the second part.

Said party of the second part in consideration of the leasing of the premises aforesaid by the said party of the first part to said party of the second part, doth hereby covenant and agree to and with the said party of the first part, to pay to the said party of the first part rent for said demised premises as follows, viz.:—

For the first year of said term, to-wit: From the first day of August in the year of our Lord, one thousand eight hundred and eighty-six (1886) to and until the thirty-first (31st) day of July in the year of our Lord, one thousand eight hundred and eighty-seven (1887), the sum of Three Thousand Eight Hundred and Seventy-two and Fifty One-Hundredths Dollars ($3,872.50), to be paid on the thirty-first (31st) day of July in the year of our Lord, one thousand eight hundred and eighty-seven (1887). For the next nineteen (19) years of said term, that is to say, from the first

day of August in the year of our Lord, one thousand eight hundred and eighty-seven (1887), to and until the thirty-
79 first (31st) day of July in the year of our Lord, one thousand nine hundred and six (1906), a yearly rental equal to six per cent. of One Hundred and Ninety-three Thousand Five Hundred Dollars ($193,500), or Eleven Thousand Six Hundred and Ten Dollars ($11,610) in gold coin of the United States; such yearly rental to be paid in four equal quarterly installments, each for the sum of Two Thousand Nine Hundred and Two and Fifty-One-Hundredths Dollars ($2,902.50) on the last day of each of the months of October, January, April and July in each and every year during said period of nineteen (19) years. And it is mutually covenanted and agreed by and between the parties hereto that the party of the second part shall pay as rent for each and every year of the residue of said term of ninety-nine (99) years, that is to say, for each and every year from the first (1st) day of August in the year of our Lord, one thousand nine hundred and six (1906) to and until the thirty-first (31st) day of July in the year of our Lord one thousand nine hundred and eighty-five (1985) a sum of money equal to six per cent. of the fair cash value of said demised premises, exclusive of improvements placed thereon by said lessee, its successors or assigns; said fair cash value to be determined in the manner hereinafter mentioned. Provided, however, that in no event shall the rent for said demised premises for any year be less than Eleven Thousand Six Hundred and Ten Dollars ($11,610); and in case six per cent. of the fair cash value of said demised premises shall at any time not equal or exceed Eleven Thousand Six Hundred and Ten Dollars ($11,610), then and in such case the yearly rental of said demised premises shall be Eleven Thousand, Six Hundred and Ten Dollars ($11,610) for the period during which six (6) per cent. of the value of said premises shall not equal or exceed Eleven Thousand Six Hundred and Ten Dollars ($11,610). The yearly rent shall be in all cases paid in four (4) equal quarter yearly installments on the last days of October, January, April and July of each and every year during said term at the office of said lessors, their heirs or assigns, in Chicago, or at such place in the City of Chicago as said lessors, their heirs or assigns, may designate. Said shall in all cases be paid in gold coin, equal in weight and fineness to the present standard coin of the United States, or its equivalent in value; and all appraisals made under the

provisions of this lease, for the purpose of fixing the amount of said rent, shall be made on the basis of like gold coin.

80 And It Is Mutually Agreed between the parties hereto that in order to fix the rent above reserved and agreed to be paid for the residue of said term, beginning with August first (1st) in the year of our Lord, one thousand nine hundred and six (1906) to the end thereof, the fair cash value of said demised premises as hereinbefore specified on the first (1st) day of August in the year of our Lord, one thousand nine hundred and six (1906) shall be taken and considered as the said fair cash value thereof, for the ten (10) years next ensuing thereafter, inclusive of said day, and so in like manner the said fair cash value of said demised premises on the first (1st) day of the month of August, which shall be in every tenth (10th) year thereafter during the continuance of said term, shall be taken and considered as the said fair cash value thereof for the ten (10) years next ensuing thereafter and inclusive of every such first (1st) day of August, so that the fair cash value of said demised premises, as before specified, on the first (1st) day of August in the year of our Lord, one thousand nine hundred and six, (1906) and on the first (1st) day of the month of August, which shall be in every tenth (10) year thereafter, that is to say, in the years one thousand nine hundred and sixteen (1916), one thousand, nine hundred and twenty-six (1926), one thousand nine hundred and thirty-six (1936), one thousand nine hundred and forty-six (1946), one thousand nine hundred and fifty-six (1956), one thousand nine hundred and sixty-six (1966), and one thousand nine hundred and seventy-six (1976) shall be the basis whereby the yearly rent to be paid for said demised premises shall be fixed in amount for the period of every ten (10) years next ensuing, and inclusive to every such first (1st) day of August, unless and until the annual rent for said demised premises for the residue of said term, beginning with said first (1st) day of August in the year of our Lord, one thousand nine hundred and six (1906), or for some part thereof, shall be raised to a larger sum than Eleven Thousand Six Hundred and Ten Dollars ($11,610) by agreement of the parties hereto, or by means or in consequence of any appraisal or appraisals which may be had or made, as hereinafter provided, in which case said party of the second part shall and will pay or cause to be paid to said party of the first part as the annual rent of said demised premises such enhanced sum, whatever it may

be, which shall be thus ascertained and established; subject, however, to the provisions hereinbefore contained, that
81 the annual rental shall in no year be less than Eleven Thousand Six Hundred and Ten Dollars ($11,610), and subject to the further provision that these provisions, or any of them, shall in nowise be construed as extending this lease beyond the thirty-first (31st) day of July in the year of our Lord, one thousand, nine hundred and eighty-five (1985).

And for the purpose of assuring to said lessors a fair annual rental for said demised premises, in case the sum of Eleven Thousand Six Hundred and Ten Dollars ($11,610) per annum shall be deemed by them too low, it is mutually covenanted, promised and agreed by and between the parties hereto that said lesors may eight times elect to have an appraisal of said demised premises as herein provided to take effect on the first (1st) day of August in the year of our Lord, one thousand nine hundred and six (1906), and on the first (1st) day of August of any even period of ten (10) years from and after the first (1st) day of August in the year of our Lord one thousand nine hundred and six (1906), and said lessors may appoint the times and designate the places for the first meetings of said appraisers, giving to said lessee ninety (90) days' notice of said lessors intention and election to have such appraisals made, specifying in each of such notices the time and place which said lessors may fix upon for the first meeting of appraisers. Such notice may be given, and one of such appraisals of said demised premises made at the option of said lessors at any time within one (1) year preceding or one (1) year succeeding the first (1st) day of August in the year of our Lord, one thousand nine hundred and six (1906), or the first (1st) day of August commencing any of said even periods of ten (10) years, and the new rate of rent established by any such appraisal shall take effect and become payable from and after the first (1st) day of August commencing such even period of ten (10) years, (with reference to which date such appraisals shall be made), and the new rate of rent established by any such appraisal shall continue to be the annual rent of said demised premises from the time that the same shall take effect as herein provided until another rate of rent be established by agreement in writing between the parties hereto, or by another appraisal made under the provisions hereto.

And It Is Further Mutually Covenanted Promised and Agreed by and between the parties hereto, that in case any

appraisal of said demised premises shall be made under
82 the provisions hereof the valuation of said demised premises shall in no event be named or fixed by any or either of the appraisers, or by any judge selected under the provisions hereof at less than the sum of One Hundred and Ninety-three Thousand Five Hundred Dollars ($193,500), and no valuation or appraisal of said demised premises by any or either of the appraisers, or by any judge shall have the effect to reduce the annual rent of said demised premises below the sum of Eleven Thousand Six Hundred and Ten Dollars ($11,610); but whenever the value of said demised premises shall be estimated by such appraisers or such judge to be of a greater sum than One Hundred and Ninety-three Thousand and Five Hundred ($193,500), such greater sum shall be the basis upon which to fix the rent of said demised premises, and the amount of six (6) per cent. computed upon such appraised value shall be the new rate of the annual rent of said premises from and after the day when the same shall take effect and become payable under the provisions hereof, and until it shall be changed by subsequent agreement or appraisal.

It Is Further Mutually Covenanted, Promised and Agreed by and between the parties hereto, that in case of any appraisal of said demised premises for the purpose of fixing a new rate of rent which shall be made under or in pursuance of the provisions hereof the appraisers to make such appraisal or appraisals, and each and every of such appraisals shall be selected, chosen and qualified in the manner following, that is to say:

First.—Said lessors shall select one (1), and said lessee shall select one (1) competent, judicious and disinterested person not related to any of the parties in interest by consanguinity or affinity to act as appraiser, each of whom shall be at the time a resident of the said County of Cook and the owner in fee of real estate in that part of Chicago bounded by the Chicago River on the north and west, Lake Michigan on the east and Twelfth street on the south, and the appraisal of these two persons if they can agree shall be binding upon the parties hereto. In case said two appraisers thus chosen cannot agree upon a valuation they shall select a third person of like qualifications to act with them, and the appraisal of any two of these three shall be binding upon the parties hereto;

Second.—If said lessee shall fail or neglect to select a per-

son with qualifications aforesaid to act as appraiser as
83 above provided, and to notify said lessors of its selection, stating in such notice the name of the person chosen by said lessee within thirty (30) days after the notice of such intended appraisal shall have been given to the said lessee, then said lessors may select two (2) persons to ast as such appraisers and the appraisal of the two persons as chosen by said lessors shall have the same force and effect as is above provided when made by appraisers selected by each party; and if these two last named appraisers cannot agree they shall selec' a third appraiser of like qualifications required as aforesaid to act with them, and the appraisal of two of these three shall have the same force and effect as above provided;

Third.—If no two of the appraisers selected as aforesaid can agree upon a valuation or in case any two persons selected as appraisers as aforesaid, do not agree upon the selection of a third person of like qualifications to act with them, then upon the application of said lessors to any Judge of any court of record of the county which may then include the said premises, said Judge may, and is hereby empowered and requested to make such appraisal not exceeding the highest or falling below the lowest valuation of the two original appraisers (in case he is in any way informed of such original appraisal), as he shall after having examined into the matter and become satisfied concerning the same by evidence or otherwise, deem just; and the decision of such Judge shall be of the same force and effect as is the valuation determined upon by said Judge had been agreed upon by any two original appraisers.

It Being Further Mutually Covenanted and Agreed that in case the two original appraisers chosen in either of the ways above provided shall fail to agree upon the valuation, or having so failed to agree upon the valuation, shall fail to choose a third person with the qualifications aforesaid within twenty (20) days after the rate fixed upon for the appraisers to first meet, to act with them, and to notify said lessors in writing of any agreement or of any such failure within said last named twenty days;—or in case said two appraisers shall have agreed as to the third person and such third person shall fail to agree with either of said original appraisers upon such valuation and said lessors shall not be notified of any agreement or such failure to agree in writing within thirty (30)

days from the said time fixed for the first meeting of the original appraisers, then and in either such case, said lessors
84 may at their option apply to any judge of any court of record as above provided, who shall proceed to and within a reasonable time make such appraisal in the manner aforesaid.

And It Is Further Mutually Agreed, that in case of any appraisal of said demised premises, the appraisers shall be sworn to make such appraisal impartially and in accordance with the rules and provisions herein inserted for their guidance, provided, however, that no judge who may be called upon pursuant to the stipulation herein contained, shall be required to be sworn, and by the consent of both parties hereto the oath may be waived as to any or either of the other appraisers. If such appraisals or either of them shall be made or agreed upon by two appraisers in the manner aforesaid, their appraisal shall be reduced to writing and signed by both of said appraisers and delivered to said lessors within the time herein limited for completing such appraisal, and shall then be binding; if made by three appraisers then after being reduced to writing it shall be signed by at least two of the three and delivered to said lessors within the time aforesaid and shall then be binding, but if the appraisal be made by a judge as before provided, then when it shall have been reduced to writing and signed by him alone and delivered to said lessors, it shall in like manner be binding upon both parties hereto.

The expense of every appraisal which shall be made under the provisions hereof shall be paid and borne equally by the two parties hereto, one-half by each.

It Is Further Mutually Covenanted and Agreed, that in case of any appraisal of said demised premises for the purpose of establishing an annual rental under the provisions hereof, the question to be submitted to and passed upon by said appraisers shall be "what in your mature and candid judgment is the present value of the said demised premises (not taking into consideration the buildings thereon) if the same were to be sold to be paid for in cash?" Six per cent. computed upon such valuation of said demised premises shall be the annual rental thereof from the time the same is to take effect according to the provisions hereof, provided, however, that no appraisal shall reduce the amount of the annual rent below the minimum sum of Eleven Thousand Six Hundred and Ten Dollars ($11,610) above mentioned.

And the Said Party of the Second Part Further Covenants and Agrees to and with said party of the first part that said party of the second part will pay all water rates and all taxes and assessments, general and special, ordinary and extraordinary, of every nature and kind whatsoever which may be levied, imposed or assessed during the continuance of this lease on the premises herein demised (not including, however, the taxes for the year 1886) or upon any buildings, additions or improvements of any kind which may after the date of this lease and before the expiration of the term of this lease be erected, made or placed thereon, whether such tax, rate or assessment shall be for city, county, state or other purpose whatever; and if any such rate, tax or assessment shall be paid by the said party of the first part (said party of the first part being hereby authorized to pay any such tax, rate, or assessment at any time after the same becomes due and payable) whether the same be so paid before or after sale or forfeiture; the amount or amounts so paid from time to time therefor shall be paid by said second party with eight (8) per cent. interest thereon to said party of the first part when the next installment of rent falls due after such payment; and all receipts taken for any and all payment or payments whether made by one party or the other shall be made out in the name of the said party of the first part or the party or parties who shall have succeeded to their interest in said premises, and which said receipts shall be delivered over to said party of the first part or those claiming under them, upon demand.

Said Party of the Second Part Further Covenants and Agrees, that it will not sell, assign or convey this lease or the term thereby created or its interest in said premises above described unless the assignee or assignees, purchaser or purchasers shall contemporaneously and at the time of such sale or assignment execute and deliver to said party of the first part, a written instrument duly sealed and acknowledged by which such assignee or purchaser shall accept and assume all the terms, covenants, agreements and obligations of this lease on the part of the second party hereto, and become bound to comply therewith and to keep and perform all covenants and agreements herein contained to be kept and performed on the part of the second party hereto.

And It Is Further Covenanted and Agreed, that every assignee or purchaser shall be subject to the same terms and conditions as to any assignment or sale by him as is above

provided in relation to such first sale or assignment, and also to all the covenants, agreements, provisions and conditions in this lease contained.

86 And It Is Further Covenanted and Agreed, by and between the parties hereto that the said party of the second part and every assignee under it shall be liable for and subject to all covenants, agreements, provisions and conditions herein contained until the expiration of the term hereby demised, notwithstanding any sale or assignment of its, his or their interest in this lease and in the premises hereinbefore described.

It Is Expressly Understood, Covenanted and Agreed, however, by and between the parties hereto, that the leasehold interest hereby created may be conveyed by the party of the second part by way of mortgage or deed of trust in the nature of mortgage to secure an indebtedness without compliance with the foregoing provisions of this lease relating to sales and assignments but subject, however, to all the other provisions and covenants of this lease and to the first lien of the party of the first part for rent accrued or to accrue under the terms of this lease.

The Party of the Second Part Further Covenants and Agees, that it will not use or suffer or permit any other person to use any building or enclosure upon said premises or any part thereof, for any immoral or illegal purpose or for any purpose or use in violation of the laws of the United States or the State of Illinois or ordinances of the City of Chicago.

And It Is Further Covenanted, Promised and Agreed, that it shall and will be lawful to and for said lessors, their agents and representatives with or without workmen in their employ, with them, to enter upon said demised premises at reasonable and proper times during any part of the time said demised premises or any part thereof shall be held by said lessee or its assigns under this indenture, to make a special or general examination of the structures then standing and being in and upon said demised premises for the purpose of ascertaining the general defects if any in the buildings and improvements upon said premises, and for any other proper and legitimate purpose.

And the Said Party of the Second Part Further Covenants and Agrees to and with said party of the first part, that if default shall at any time be made by said party of the second part in the payment of said rent upon the day the same be-

comes due and payable as aforesaid, or if default shall be made in either of the covenants respecting assignments, rebuilding or insuring, or in any of the covenants herein
87 contained to be kept by the party of the second part and such default shall continue for six (6) months after notice thereof in writing by the party of the first part to the party of the second part (and also to such mortgagees as shall have notified said first party in writing of their interest and address) it shall and may be lawful for the party of the first part at their election to declare said term ended and into said demised premises or the buildings situate thereon or any part thereof either with or without process of law to re-enter, and the said party of the second part or any other person or persons occupying in or upon the same to expel, remove and put out, using such force as may be necessary in so doing, and said demised premises and the buildings situate thereon to possess, repossess and enjoy as in their first and former estate; and to distrain for any rent or other moneys that may be due thereon upon any property belonging to the party of the second part, meaning and intending hereby to give to the party of the first part a valid and first lien upon the leasehold interest or estate hereby created, and also upon any and all buildings, improvements, and other property on said premises belonging to the party of the second part as security for the payment of said rent, as in the manner aforesaid and at the times aforesaid, anything hereinbefore contained to the contrary notwithstanding, and if at any time said term shall be ended at such election of said party of the first part aforesaid, the party of the second part does hereby agree to surrender and deliver up the above described premises with all buildings and improvements situate thereon, peaceably to said party of the first part immediately upon the termination of said term as aforesaid, and without any compensation being paid for said buildings and improvements.

And the Party of the Second Part Further Covenants and Agrees, to and with the party of the first part, that it will conform to all municipal ordinances, and laws and all other laws and ordinances affecting said premises and the sidewalks and streets in front of and around said premises, and that it will save the party of the first part forever harmless from any penalty or damage, charged or imposed for any violation of any of said laws or ordinances and will further save said party of the first part during the term of this lease harmless

and indemnified at all times against loss, damage, cost or expense in any way arising or growing out of the use of said premises under this lease, or in any way arising or growing out of any injury to person or property in or about said
88 premises or the buildings erected thereon, or the streets or sidewalks in front of or around the same.

And the Said Party of the Second Part Further Covenants and Agrees, that it will at all times during the term hereby demised, at its own proper costs and charges, keep the buildings situate upon said demised premises and all appurtenances belonging thereto all in good repair and in a safe and secure condition, and that it will keep all rooms in said buildings in a good, safe, clean and tenantable condition and repair during the entire term of this lease.

Said Party of the Second Part Further Covenants and Agrees, that whenever and as soon as the buildings to be erected upon said premises are sufficiently advanced in construction to be insurable, and from time to time as the erection thereof progresses, said lessee will procure insurance thereon in such companies as may be approved by said party of the first part to an amount aggregating a sum not less than $60,000, and keep the same so insured during the said term of ninety-nine (99) years, but in no case shall said buildings or improvements be insured for more than their full insurable value. A complete list of all insurance thereon shall whenever demanded be furnished the said party of the first part, and the receipts for the premiums paid for such insurance for the curernt year shall be shown whenever demanded by the lessors. If said building or any part thereof shall at any time or times during the continuance of the term hereby granted be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before said fire happened, or such other plans as by the party of the first part shall be approved in writing, and have the same rebuilt and ready for occupancy within two years from time of such loss or destruction, and that as often as said buildings or improvements shall be burned down or damaged by fire all and every the sum or sums of money which shall be recovered or received by the party of the second part, for and in respect of said insurance shall be laid out and expended by it in repairing and rebuilding said buildings.

And It Is Further Mutually Covenanated and Agreed by the parties hereto, that policies of insurance upon the build-

ings and improvements upon said demised premises to the amount of Sixty Thousand Dollars ($60,000) shall at all times during the term of this lease provide that the loss if any shall be payable to the party of the first part; and said policies shall be held by the party of the first part as
89 collateral security for the payment of rent and the performance of the lessee's covenants herein contained, and said party of the first part in case said buildings or improvements shall at any time or times be damaged or destroyed by fire during the term of this lease, shall pay to said party of the second part so much of said insurance money as may be received by them on account of such loss or destruction when and as soon as said party of the second part shall have rebuilt or repaired said buildings and improvements, or shall have expended not less than Sixty Thousand Dollars ($60,000) in rebuilding and repairing the same, provided, however, that in no case shall said party of the second part be entitled to receive any of said insurance money from said party of the first part until it shall have expended all other insurance money that it may have received from all other insurance on said premises, in rebuilding and repairing the same, unless the said buildings shall be damaged less than twenty-five (25) per cent., in which event the insurance money in the hands of said first party shall be used in repaying the expense of repairing said buildings upon architects certificates.

It Is Expressly Covenanted and Agreed between the parties hereto, that the party of the first part shall pay no interest upon any such insurance money in their hands to the party of the second part, and that in case the party of second part shall not have rebuilt or repaired the building or buildings injured or destroyed as aforesaid within two (2) years next ensuing after such destruction or injury, then and in that case all moneys received by said party of the first part on account of insurance as aforesaid, shall at the election of said party of the first part belong to said party of the first part as liquidated and ascertained damages by reason of the failure of said party of the second part to rebuild or repair as hereinbefore provided, and not as a penalty or in the nature thereof; and in the event that the term hereby demised shall be forfeited by reason of the failure to pay rent, or breach of any other covenant while said party of the first part shall have in his hands any insurance money, then and in such case,

such insurance money shall belong to and be the property of said party of the first part.

It Is Further Covenanted, that in the event that said second party shall at any time fail to keep the improvements upon said premises insured as herein provided, then and in such case said party of the first part shall have the right to take out policies of insurance thereon so as to have at all times the insurance thereon hereinbefore provided for, and all premiums paid by said first party on such policies of insurance with interest thereon at eight (8) per cent. shall be repaid to said first party by said second party with the installments of rent next falling due thereafter.

It Is Further Mutually Covenanted and Agreed by and between the parties hereto, that if at any time during said term hereby granted and until said lessors become the owners of the buildings above mentioned or any buildings erected thereafter upon the said demised premises, the buildings standing upon said demised premises shall be injured or destroyed by fire and the said sum of Sixty Thousand Dollars ($60,000) or any part thereof shall come into the hands of said lessors under or by virtue of policies of insurance as aforesaid, then said lessors shall and may deduct from such insurance money whatever may be or become due to said lessors under the provisions of this lease at any time while said money or part thereof shall remain in the hands of said lessors, before paying over to or for said lessee, any part of said insurance money for the purpose of repairing or reconstructing said buildings so injured or destroyed, or for any other purpose.

It Is Further Covenanted and Agreed by and between the parties hereto, that in the event of the determination of this lease at any time before the expiration of the term of ninety-nine (99) years hereby demised for the breach of any of the covenants herein contained, then and in such case, all buildings, fixtures and improvements then situated upon said demised premises shall belong to and be the property of said lessors and no compensation therefor shall be allowed or paid to said lessee.

It Is Further Covenanated and Agreed by and between the parties hereto, that within one year before the expiration of this lease, to-wit:—Between the first (1st) day of August in the year of our Lord one thousand, nine hundred and eighty-four (1984) and the thirty-first day of July in the year of our Lord, one thousand nine hundred and eighty-five (1985) an

appraisal shall be made of the actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises (exclusive of and not including the value of the land or ground) at the time of such appraisal; said appraisal to be made by appraisers appointed and selected in the manner hereinbe-
91 fore provided for the appointment and selection of appraisers to value the land demised for the purpose of fixing the rental to be paid under the terms of this lease.

It is further mutually agreed between the parties hereto, that all the foregoing provisions relating to appraisals to determine the value of the land for the purpose of fixing the rental, respecting notices as to length of time and parties giving same conformative thereto, qualifications and selection of appraisers, making and completing appraisals, reference to the Judge of the court of record as arbitrator, and all other conditions connected therewith shall apply to the making the appraisal for determining the value of said buildings or improvements, as hereinbefore provided for.

It Is Further Covenanted and Agreed by and between the parties hereto, that at the appraisal to determine the value of the buildings and improvements standing upon said demised premises, the only question to be submitted and passed upon in making such appraisal shall be, "What is your mature and candid judgment is the cash value of the buildings then on the premises hereby demised?"; it being the true intent and meaning hereof that such appraisal shall fix and determine the actual cash value of said buildings, taking into consideration the style of such building, its adaptation to the trade and business then carried on and conducted in that locality, disconnecting the same from any other building with which it may be connected or from a part, if any. And the said appraisers or Judge shall take into consideration the suitableness of said improvements as to character and condition, to secure the largest returns from the demised premises to the owners thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant.

And the Party of the First Part Covenant and Agree with the party of the second part, that they will on the first day of August in the year of our Lord, one thousand nine hundred and eighty-five (1985) purchase said buildings and im-

provements then on said demised premises at their fair cash value determined as aforesaid, said purchase money to be paid in cash at said date. Said appraisal to be made on the basis of, and the payment of said purchase money to be made in gold coin or its equivalent as hereinbefore provided for the appraisal and payment of rent.

92 And It Is Further Covenanted and Agreed by and between the parties hereto, that in the event that the fair cash value of said buildings and improvements on said demised premises shall not have been ascertained and determined as herein provided, on or before the said thirty-first (31st) day of July in the year of our Lord, one thousand, nine hundred and eighty-five (1985), then and in such case, the said party of the second part shall have a lien on said premises, land and improvements, for the payment of the said value of said improvements and buildings when ascertained (with interest thereon at the rate of six (6) per cent per annum from the date when said first party shall receive possession thereof until the same is paid), notwithstanding the surrender of the possession thereof to said party of the first part upon the expiration of this lease, it being understood that in such case the possession of said buildings and improvements shall be surrendered to said party of the first part on the thirty-first (31st) day of July in the year of our Lord, one thousand nine hundred and eighty-five (1985) without the payment of the value thereof, as hereinbefore provided.

And It Is Further Stipulated and Agreed, that unless the appraised value of said buildings and improvements shall be paid by said party of the first part on the first (1st) day of August in the year of our Lord, one thousand nine hundred and eighty-five (1985), or as soon thereafter as the value of said buildings and improvements shall be ascertained and determined under the provisions thereof; then said party of the second part may at once file its bill to enforce the payment thereof and its lien therefor upon the said premises.

It Is Further Covenanted and Agreed between the parties hereto, that in case said party of the first part shall not call an appraisal for the purpose of ascertaining rental value of said demised premises, or to determine the value of said buildings and improvements within any of the times herein provided for such appraisals, then said lessee may at its election within thirty (30) days thereafter call such appraisal to take place within ninety (90) days thereafter and otherwise to be under the same powers and conditions as are herein

provided for said Lessors, and if so made to take effect at the dates respectively provided for same.

It Is Further Covenanted and Agreed between the parties hereto, that each party to this lease shall furnish to the other a name and place to which all notices provided for in
93 this lease may be addressed, which name and place may be changed from time to time by the respective parties, and those claiming under them, and a delivery of the notice to the address so given shall be considered a good and sufficient service of such notice on the party furnishing such address, and on all parties claiming an interest under such parties.

It Is Further Expressly Covenanted and Agreed by and between the parties hereto that in no case shall said party of the first part be liable under any express or implied covenant of this lease for damages caused by or arising from any defect or imperfection in the title of said party of the first part to the premises hereby demised to an amount in excess of the rent paid to said first party for such period of time as such second party may be compelled by law to pay damages for occupying said demised premises to the person or persons adjudged to be the rightful owner thereof; but in case of the eviction, dispossesion or ejectment of said second party from said demised premises by reason of any such defects or imperfections, then in such case said party of the second part shall not be compelled thereafter to pay any further rent to the party of the first part.

It Is Further Agreed, that if it shall be determined by said party of the second part to issue Bonds maturing in twenty (20) years, the first revaluation, as provided for in this lease, shall be deferred for one year, that is to say, such revaluation shall be made as of the first (1st) day of August in the year one thousand, nine hundred and seven (1907) instead of the year one thousand, nine hundred and six (1906), but all other and subsequent revaluations shall be made as hereinbefore provided.

It Is Further Covenanted and Agreed by and between the parties hereto, that the party of the second part shall pay all costs and attorney's fees which may be incurred by said party of the first part in enforcing the covenants and agreements of this lease, and also that all covenants, agreements, rights, privileges, conditions, specifications and recitals in this lease contained shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto, lessors and lessee, the same as if in

every case expressed, and shall be construed as running with the land.

In Witness Whereof the said parties of the first part have hereunto set their hands and seals, and the said party of the second part has caused these presents to be signed by its
94 Vice President (owing to the disability of its President) and its Corporate Seal to be hereunto offixed, duly attested by its Secretary on the day and the year first above written.

WALTER L. PECK, (Seal)
CLARENCE I. PECK, (Seal)
FRED. W. PECK, (Seal)
CHICAGO AUDITORIUM ASSOCIATION,
By EDSON KEITH,
Vice President.

(Corporate Seal)

Attest:
ARTHUR F. TOWNE,
Secretary.

95 EXHIBIT 7.

This instrument, made the tenth day of July, A. D. 1891, between Francis Bartlett, of Boston, Massachusetts, (trustee for Caroline Bartlett under the will of John F. Slater) and William A. Slater of Norwich, Connecticut, party of the first part, and the Chicago Auditorium Association, a corporation organized and doing business under the laws of the State of Illinois, party of the second part.

Witnesseth, that whereas, Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck let and demised to said party of the second part certain premises in the City of Chicago, County of Cook and State of Illinois for the term of ninety-nine (99) years from and after the first day of August, A. D. 1886, by a lease dated January 24th, A. D. 1887, and recorded in Cook County, Illinois, in Book 2106 of Records, page 473, on July 29th, A. D. 1887 (Doc. No. 855865);

And whereas, said lessors conveyed the same premises to said Francis Bartlett, Trustee, and William A. Slater as equal tenants in common by a deed dated February 2nd, A. D. 1889, and recorded in said Cook County February 4th, 1889 (Doc. No. 1058365) in Book 2478 of Records, page 457, said premises being particularly described as follows, viz:

Sub-lots Two (2), Three (3), Five (5) and Six (6) in Ely and Reynolds' Subdivision of Original Lot Ten (10) in Block Nine (9) of Fractional Section Fifteen (15) Addition to Chicago, in Cook County, Illinois; also that part of Original Lot Ten (10) aforesaid bounded as follows: Commencing at the southeast corner of said sub-lot Six (6); thence east ten (10) feet to the southwest corner of said Sub-lot Three (3), thence north along the west line of said sub-lot Three (3) to the northwest corner thereof; thence west five (5) feet; thence south parallel with the west line of said sub-lot Three (3) twenty-five (25) feet more or less to the intersection of the north line of said sub-lot five (5) extended east; thence west on said line five (5) feet to the northeast corner of said sub-lot five (5); thence south on the east line of said sub-lots five (5) and six (6) to the place of beginning.

And whereas, the said Chicago Auditorium Association formally attorned to said Francis Bartlett, trustee, and to
96 said William A. Slater, and acknowledged them to be the landlords of said Association in the place of said Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck, Lessors by an Instrument dated February 2nd, A. D. 1889, and recorded in Cook County, Illinois, in Book 2425 of Records, page 214, (Doc. 1058368);

It is hereby agreed between the respective parties hereto—

First: That the term of said lease shall be extended for one hundred years and one day, so as to expire on the first day of August in the year of our Lord two thousand and eighty-five (2085) instead of on the thirty-first day of July, A. D. nineteen hundred and eighty-five (1985).

Second: That henceforth and during the entire term of said lease the rental under said lease shall be paid at such bank in the City of New York, or at such bank in the City of Boston, Massachusetts, as may be from time to time specified in writing by said party of the first part, their heirs and assigns.

Third: That the yearly rent for said demised premises until and including the thirty-first day of July, A. D. 1896, shall be Eleven Thousand Six Hundred and Ten Dollars ($11,610.00) in equal quarterly installments of Twenty-nine Hundred and Two 50/100 Dollars, payable on the last day of each of the months of October, January, April and July during said period in standard gold coin of the United States

equal in weight and fineness to the present standard coin of the United States, and for each and every year from the first day of August in the year of our Lord eighteen hundred and ninety-six (1896) to and until the first day of August in the year of our Lord two thousand and eighty-five (2085) the yearly rent of Fourteen Thousand Dollars ($14,000) in standard gold coin of the United States equal in weight and fineness to the present standard coin of the United States, to be paid in quarterly installments each of Thirty-five Hundred Dollars ($3500) on the last day of each of the months of October, January, April and July in each and every year during said period of one hundred and eighty-nine (189) years ending August first, A. D. 2085.

The rental herein fixed and established shall be in the place and stead of the rental named in said lease and shall supersede and set aside the provisions of said lease for establishing the rate of rental by decennial appraisement of said premises.

Provided, nevertheless, and this Agreement is subject to this express stipulation, that in case that certain mort-
97 gage or deed of trust executed by said Chicago Auditorium Association to the Illinois Trust and Savings Bank dated February first, A. D. 1889, and recorded (Doc. No. 1058261) in Book 2515 of Cook County Records, page 61, shall be foreclosed, and in case the owners of the leasehold in said premises under such foreclosure shall fail to ratify the modifications of said lease above and herein set forth, the party of the first part shall then be no longer bound by this contract and shall be entitled to insist upon the strict and literal fulfillment of the provisions of said original lease.

Subject to said stipulation, all the covenants, conditions and provisions of said original lease, except only as herein modified, shall continue in force, and the party of the first part shall have all the rights and remedies therein reserved for the enforcement of lessee's covenants in said lease or in this agreement contained, including the right to terminate said lease upon default as therein provided.

In Testimony Whereof, the Chicago Auditorium Association (by an order of the Board of Directors, passed July 6th, A. D. 1891) has caused these presents to be signed by its Vice President and Secretary, and its corporate seal to be hereunto affixed, and the said Francis Bartlett, trustee, and

William A. Slater have hereto set their hands and seals the day and year first above written.

FRANCIS BARTLETT, (Seal)
Trustee for Caroline Bartlett under the will of John F. Slater.
W. A. SLATER (Seal)

Witness to Francis Bartlett,
Trustee, and W. A. Slater.
W. A. MOTT,
Notary Public.

CHICAGO AUDITORIUM ASSOCIATION,
By J. R. WALSH,
2nd Vice President.

(Corporate Seal) *2nd Vice President.*

Attest:
CHAS. H. LUNT,
Secretary.

98 State of Illinois, } ss.
County of Cook. }

I, F. M. Blount, a Notary Public in and for said County, do hereby certify that J. R. Walsh, 2nd Vice President and Chas. H. Lunt, Secretary of the Chicago Auditorium Associations, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered said instrument as the free and voluntary act and deed of said Chicago Auditorium Association and of themselves for the uses and purposes therein set forth; that they executed said instrument by express authority of the Board of Directors of said Association; and that the seal affixed thereto is the corporate seal of said Association.

Given under my hand and notarial seal the fourth day of August, A. D. 1891.

F. M. BLOUNT,
(Notarial Seal) *Notary Public.*

Canada,
Province of New Brunswick, } ss.
County of Restigouche, }

Before me, W. Albert Mott, a Notary Public in and for the Province of New Brunswick by Royal authority duly appointed and sworn, residing and practicing at the Town of Campbellton, in the said County of Restigouche, this day personally came Francis Bartlett, Trustee, who is personally known to me to be the same person described in and whose name is subscribed to the foregoing instrument, and acknowledged that he signed, sealed and delivered said instrument as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and official seal this thirtieth day of July, A. D. 1891.

W. A. Mott,
(Notarial Seal) *Notary Public.*

99 Canada,
Province of New Brunswick, } ss.
County of Restigouche. }

Before me, W. Albert Mott, a Notary Public in and for the Province of New Brunswick by Royal authority duly appointed and sworn, residing and practicing at the Town of Campbellton, in the County of Restigouche and Province aforesaid, this day personally came William A. Slater, who is personally known to me to be the same person described in and whose name is subscribed to the foregoing instrument and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act and deed, for the uses and purposes therein set forth.

Given under my hand and official seal this thirtieth day of July, A. D. 1891.

W. A. Mott,
(Notarial Seal) *Notary Public.*

100 EXHIBIT 8.

This Indenture made this First day of February, in the year of our Lord One Thousand Eight Hundred and Eighty-seven (1887), between the Studebaker Brothers Manufacturing Company, a corporation organized under the laws of the State of Indiana, party of the first part, and the Chicago Auditorium Association, a corporation organized and doing business under the laws of the State of Illinois, party of the second part,

Witnesseth: That the said party of the first part, in consideration of the rents hereinafter reserved, and of the covenants and agreements herein contained on the part of the said party of the second part, its successors and assigns, to be kept, performed and fulfilled, hath demised and leased and doth by these presents demise and lease unto the said party of the second part, its successors and assigns, all those premises situate and being in the City of Chicago, in the County of Cook and State of Illinois, known and described as follows, to wit: Lot Eighteen (18) in the Assessors' Division of Lots One (1), Two (2), Three (3), Four (4), Five (5) and Eight (8) in Block Nine (9), in Fractional Section Fifteen (15), Addition to Chicago; said premises have a frontage of twenty-six and sixty-seven hundredth (26.67) feet more or less on Michigan Avenue.

To have and to hold the above described premises with the rights, privileges, easements and appurtenances thereunto attaching and belonging, unto the said party of the second part, its successors and assigns, for and during the term of ninety-nine (99) years from and after the first day of August in the year of our Lord one thousand eight hundred and eighty-six (1886), that is to say, from the first day of August in the year of our Lord one thousand eight hundred and eighty-six (1886) for, during and until the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985), if the said lessor, its successors or assigns, shall not elect to determine the term sooner for non-payment of rent, or breach of covenant, yielding and paying rent therefor as hereinafter set forth.

And the said party of the second part covenants and agrees to and with the said party of the first part, to forthwith begin to build on said premises a substantial and fireproof

building of brick, stone, iron, steel, and tile, and such
101 other materials as are necessary and usual in fireproof buildings in the City of Chicago; the same to be in all respects in accordance with the building ordinances of the City of Chicago, and to cost not less than the sum of Fifty Thousand Dollars ($50,000). And that it will carry on and prosecute the erection of said building with all reasonable despatch, and have the same completed before the first day of August in the year of our Lord one thousand eight hundred and eighty-nine (1889); said building, in the character of the materials to be used in its construction, to be as follows:

All columns shall be of iron, stone, or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta or hollow tile or like material; all beams, joists, and roof beams and joists, shall be of iron or steel; all constructional floors shall be arches of hollow tile, or like material; all partitions shall be of brick or hollow tile; the roof shall be of iron, brick or hollow tile; the stage of the auditorium in said building, however, shall be built of such materials and in such manner as shall seem most expedient to the party of the second part.

Said party of the second part, in consideration of the leasing of the premises aforesaid by said party of the first part to said party of the second part, doth hereby covenant and agree to and with the said party of the first part, to pay to the said party of the first part, as rent for said demised premises, as follows, viz:

For the first year of said term, to wit, from the first day of August, in the year of our Lord one thousand eight hundred and eighty-six (1886) to and until the first day of August in the year of our Lord one thousand eight hundred and eighty-seven (1887) One Thousand and Fifty Dollars $1050.00).

For the next nineteen years of said term, that is to say from the first day of August in the year of our Lord one thousand eight hundred and eighty-seven (1887) to and until the first day of August in the year of our Lord one thousand nine hundred and six (1906), a yearly rental of Eighteen Hundred Dollars ($1800) in gold coin of the United States. Such yearly rental to be paid in four equal quarterly installments, each for the sum of four hundred and fifty dollars ($450.00) on the fifteenth (15) day of each of the months of October, January, April and July in each and every year

during the said period of nineteen (19) years. And it is mutually covenanted and agreed by and between the parties hereto, that the party of the second part shall pay as
102 rent for each and every year of the residue of said term of ninety-nine (99) years, that is to say for each and every year from the first day of August in the year of our Lord one thousand nine hundred and six (1906) to and until the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985) a sum of money equal to six per cent of the fair cash value of said demised premises, exclusive of improvements placed thereon by said lessee, its successors or assigns. Said fair cash value to be determined in the manner hereinafter mentioned; provided, however, that in no event shall the rent for said demised premises for any year be less than Eighteen Hundred Dollars $1800.00). And in case six per cent of the fair cash value of said demised premises shall at any time not equal or exceed Eighteen Hundred Dollars ($1800.00), then in such case the yearly rental of said demised premises shall be Eighteen Hundred Dollars ($1800.00) for the period during which six per cent of the value of said premises shall not equal or exceed Eighteen Hundred Dollars ($1800.00). The yearly rent shall in all cases be paid in four equal quarter-yearly installments, on the fifteenth (15) day of each month of October, January, April and July of each and every year during said term, at such place in the city of Chicago as said lessor, its successors or assigns, shall from time to time previously designate, and in default of such designation, then at said demised premises. Said rent shall in all cases be paid in gold coin, equal in weight and fineness to the present standard coin of the United States, or its equivalent in value; and all appraisals made under the provisions of this lease, for the purpose of fixing the amount of such rent, shall be made in like gold coin.

And it is mutually agreed between the parties hereto, that in order to fix the rent above reserved and agreed to be paid for the residue of said term, beginning with August first in the year of our Lord one thousand nine hundred and six (1906) to the end thereof, the fair cash value of said demised premises as hereinbefore specified, on the first day of August in the year of our Lord one thousand nine hundred and six (1906) shall be taken and considered as the said fair cash value thereof, for the ten years next ensuing thereafter, inclusive of said day, and so in like manner the said fair

cash value of said demised premises on the first day of the month of August, which shall be in every tenth year thereafter, during the continuance of said terms shall be taken and considered as the fair cash value thereof, for the ten
103 years next ensuing thereafter, and inclusive of every such first day of August. So that the fair cash value of said demised premises, as before specified, on the first day of August in the year of our Lord one thousand nine hundred and six (1906), and on the first day of the month of August, which shall be in every tenth year thereafter (that is to say in the years one thousand nine hundred and sixteen (1916), one thousand nine hundred and twenty-six (1926), one thousand nine hundred and thirty-six (1936), one thousand nine hundred and forty-six (1946), one thousand nine hundred and fifty-six (1956), one thousand nine hundred and sixty-six (1966), and one thousand nine hundred and seventy-six (1976), shall be the basis whereby the yearly rent to be paid for said demised premises shall be fixed in amount for the period of every ten (10) years next ensuing, and inclusive of every such first day of August, subject, however, to the provision hereinbefore contained, that the annual rental shall in no year be less than Eighteen Hundred Dollars ($1800.00); and also subject to the further provision that this provision of the lease shall in no wise be construed as extending the lease beyond the first day of August in the year of our Lord one thousand nine hundred and eighty-five.

It is further mutually covenanted and agreed between the parties hereto, that in order to ascertain the said fair cash value of said demised premises as before specified, at each of the above dates, an appraisal thereof shall be made within the period of sixty (60) days immediately preceding each of said dates by appraisors selected in the following manner, viz: The party or parties then interested on either part hereto shall, not exceeding ninety (90) days prior to each of said dates, select a competent and disinterested person as appraisor, who shall be at the time a resident of the County of Cook, and the owner in fee of real estate in that part of Chicago bounded by the Chicago River on the north and west, Lake Michigan on the east, and Peck Court on the south, and not related to any of the parties in interest by consanguinity or affinity, and notify the party then interested on the other part hereto, of such selection; whereupon the other party shall, within fifteen (15) days thereafter, select another per-

son of like character and qualifications as appraisor, and notify the party making the first selection of such second selection or appointment; and in case the party receiving such notice of such first selection of an appraisor shall not, within fifteen (15) days, select an appraisor as above provided,
104 and notify the other party, the party having given such notice may select a second appraiser of like qualifications, and the two persons chosen, as appraisors as above provided, shall select a third appraisor, of like character and qualifications as above; or if the two appraisors selected as aforesaid cannot agree upon such third appraisor, either of the parties to this lease, or the party or parties who shall have succeeded to the interest of either of the parties under this lease, shall have the right to apply to any judge of any court having chancery jurisdiction within said County of Cook, for the appointment of a third appraisor, and any judge to whom such application shall be made, upon satisfactory evidence being furnished him that ten (10) days' notice of such application has been given by the party making the application to the other party in interest under this lease, or to the appraisor selected by such other party, shall have the power to appoint a third person, who shall have the same qualifications, powers and duties as though he had been selected by the two appraisors first chosen.

It shall not be incumbent upon any appraisors selected under the provisions of this lease to give any notice of the time and place of holding their meetings, or to hear any evidence or arguments, and no appraisement shall be invalid by reason of not having been made within the time provided by this lease, and the award in writing under oath of said appraisors, or a majority of them, of the then value of said demised premises, exclusive of the improvements thereon, shall be binding upon the parties to this lease, and all parties claiming under them, for the purposes hereinbefore specified. In case a person selected to act as appraisor shall neglect or refuse to serve, or be unable to act, then the party appointing him shall forthwith appoint another person in his place, with like qualifications, powers and duties, and if the person so appointed shall neglect, refuse, or be unable to serve, another person shall be selected in like manner to act in his place, and so on, until a person shall be appointed appraisor able and willing to act. All expenses of such appraisal, including a reasonable compensation to the appraisors, shall be borne equally by the parties hereto.

It is further mutually agreed between the parties hereto, that if for any cause whatever a valid award shall not be made and completed before the expiration of ninety days after the beginning of the time or period for which if duly made it would fix the value of said demised premises as aforesaid, then any person or persons at the time interested upon either part or side hereto, shall have the right and be entitled to apply to any court of record in said County of Cook to have the said value ascertained, and the value of said premises, when determined and ascertained by the judgment or decree of said court, shall be binding upon all parties concerned for the purpose of ascertaining the rent to be paid under this lease, in all respects the same as though such value had been determined by appraisement under the provisions hereof, and until the value of said premises is so ascertained, either by appraisement or the judgment or decree of a court of record, or in some other legal and competent manner, the rent shall be paid regularly at the same rate at which the same shall have been paid for the ten years immediately preceding; and when said basis is fixed and ascertained, the excess of rent so paid, if any, shall be refunded to said party of the second part, or the deficiency in the rent so paid, if any, shall be made good, and the same shall be paid when the next installment of rent falls due after said value shall be fixed.

And the said party of the second part further covenants and agrees to and with the said party of the first part, that said party of the second part will pay all water rates, and all taxes and assesments, general and special, ordinary and extraordinary, of every nature and kind whatsoever, which may be levied, imposed or assessed, during the continuance of this lease, on the premises herein demised, (not including however, the taxes for the year 1886) or upon any building, addition or improvement of any kind which may, after the date of these presents, and before the expiration of the term of this lease, be erected, made or placed thereon; whether such tax, rate or assessment shall be for City, County, State or other purpose whatever; and if any such rate, tax or assessment shall be paid by said party of the first part (said party of the first part being hereby authorized to pay any such tax, rate or assessment at any time after the same becomes due and payable), whether the same be so paid before or after the sale or forfeiture, the amount or amounts so paid

from time to time therefor shall be paid by said second party, with eight per cent interest thereon to said party of the first part, when the next installment of rent falls due after any such payment; and all receipts taken for any and all payment or payments, whether made by one party or the other,
shall be made out in the name of the said party of the
106 first part, or the parties who shall have succeeded to its
interest in said premises, and which said receipts shall be delivered over to said party of the first part, or those claiming under it, upon demand.

Said party of the second part further covenants and agrees that it will not sell, assign or convey this lease, or the term hereby created, or its interest in said premises above described, unless the assignee or assignees, purchaser or purchasers, shall contemporaneously, and at the time of such sale or assignment, execute and deliver to said party of the first part a written instrument, duly sealed and acknowledged, by which such assignee or purchaser shall accept and assume all the terms, covenants, agreements and obligations of this lease on the part of the second party hereto, and become bound to comply therewith, and to keep and perform all covenants and agreements herein contained to be kept and performed on the part of the second party hereto. And it is further covenanted and agreed that every assignee or purchaser shall be subject to the same terms and conditions as to any assignment or sale by him, as is above provided in relation to such first sale or assignment, and also to all the covenants, agreements, provisions and conditions in this lease contained.

And it is further covenanted and agreed by and between the parties hereto, that the said party of the second part, and every assignee under it, shall be liable for and subject to all the covenants, agreements, provisions and conditions herein contained, until the expiration of the term hereby demised, notwithstanding any sale or assignment of its, his or their interest in this lease, and in the premises hereinbefore described. It is expressly understood, covenanted and agreed, however, by and between the parties hereto, that the leasehold interest hereby created may be conveyed by the party of the second part, by way of mortgage or deed of trust in the nature of a mortgage, to secure an indebtedness, without compliance with the foregoing provisions of this lease, relating to sales and assignments, but subject, however, to all other provisions and covenants of this lease, and to the

first lien of the party of the first part for rent accrued or to accrue under the terms of this lease.

The party of the second part further covenants and agrees that it will not use or suffer or permit any other person to use any building or enclosure upon said premises or any part thereof, for any immoral or illegal purpose, or for any
107 purpose or use in violation of the laws of the United States, or of the State of Illinois, or the ordinances of the City of Chicago.

And the said party of the second part further covenants and agrees to and with the said party of the first part, that if default shall at any time be made by said party of the second part in payment of said rent, upon the day the same becomes due and payable as aforesaid, or if default shall be made in either of the covenants respecting assignments, rebuilding or insuring, or in any of the covenants herein contained to be kept by the party of the second part, and such default shall continue six months after notice thereof in writing by the party of the first part to the party of the second part, and also to such mortgagees as shall have notified said first party in writing of their interest and address, it shall and may be lawful for the party of the first part, as its election, to declare said term ended, and into said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said party of the second part, or any other persons occupying in or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and said premises to repossess and enjoy as in its first and former estate; and to distrain for any rent that may be due thereon, upon any property belonging to the party of the second part; meaning and intending hereby to give to the party of the first part a valid and first lien upon the leasehold interest or estate hereby created, and also upon any and all buildings, improvements and other property on said premises belonging to the party of the second part, as security for the payment of said rent, in manner aforesaid, and at the time aforesaid, anything herein before contained to the contrary notwithstanding; and if at any time said term shall be ended at such election of said party of the first part as aforesaid, the party of the second part does hereby covenant and agree to surrender and deliver up said above described premises, with all buildings and improvements situated thereon, peaceably to said party of the first part, immediately upon the ter-

mination of said term as aforesaid, and without any compensation being paid for said buildings and improvements.

And the party of the second part further covenants and agrees to and with the party of the first part, that it will conform to all municipal ordinances and laws, and all other laws and ordinances affecting said premises and the sidewalks in front of and around said premises, and that it
108 will save the party of the first part forever harmless from any penalty or damage charged or imposed for any violation of any of said laws or ordinances, and will further save said party of the first part, during the term of this lease, harmless and indemnified at all times against any loss, damage, cost or expense in any way arising or growing out of the use of said premises under this lease, or in any way arising or growing out of any injury to person or property in or about said premises, or the buildings erected thereon, or the streets or sidewalks in front of or around the same.

And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper costs and charges, keep the buildings situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease.

Said party of the second part further covenants and agrees that it will, on demand, from time to time, as the building progresses, insure any buildings or improvements that may be built or placed upon said premises in such companies as may be approved by said party of the first part, to the amount of not less than Seven Thousand Five Hundred Dollars ($7500.00), and keep the same so insured during the said term of ninety-nine (99) years. But in no case shall said buildings or improvements be insured for more than their full insurable value. A complete list of all insurance thereon shall, whenever demanded, be furnished said party of the first part; and the receipts for the premiums paid for such insurance for the current year shall be shown whenever demanded by the lessor. If said buildings, or any part thereof, shall at any time or times, during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in

writing, and have the same rebuilt and ready for occupancy within two (2) years from such loss or destruction. And that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for and in respect of such insurance, shall
109 be laid out and expended by it in rebuilding or repairing said building.

It is further mutually covenanted and agred by the parties hereto, that policies of insurance upon the buildings and improvements upon said demised premises to the amount of Seven Thousand Five Hundred Dollars ($7500.00), shall at all times during the term of this lease, provide that the loss, if any, shall be payable to the party of the first part, and shall be held by the party of the first part as collateral security for the rent and the building aforesaid; and said party of the first part, in case said buildings and improvements shall, at any time or times, be damaged or destroyed by fire, during the term of this lease, shall pay to said party of the second part so much of said insurance money as may be received by it on account of such loss or destruction, when and as soon as said party of the second part shall have rebuilt or repaired said buildings and improvements, or shall have expended not less than Seven Thousand Five Hundred Dollars ($7500.00) in rebuilding and repairing the same, provided, however, that in no case shall said party of the second part be entitled to receive any of said insurance money from said party of the first part until it shall have expended all other insurance money that it may have received from all other insurance on said premises, in rebuilding and repairing the same, unless the said buildings shall be damaged less than twenty-five per cent, in which event the insurance money in the hands of said first party, shall be used in paying the expense of repairing said buildings upon architect's certificates. And it is expressly agreed and covenanted by and between the parties hereto, that the party of the first part shall pay no interest on any such insurance money in its hands to the party of the second part, and that in case the party of the second part shall not have rebuilt or repaired the building or buildings injured or destroyed as aforesaid, within the two (2) years next ensuing after such destruction or injury, then and in that case all moneys received by said party of the first part on account of insurance as aforesaid, shall, at the election of said party of the first part, belong to the said party of the first part as

liquidated and ascertained damages by reason of the failure of said party of the second part to rebuild or repair as hereinbefore provided, and not as penalty, or in the nature thereof. And in the event that the term hereby demised shall be forfeited by reason of the failure to pay rent, or breach
110 of other covenant, while said party of the first part shall have in his hands any such insurance money, then and in such case such insurance money shall belong to and be the property of said party of the first part.

It is further covenanted that in the event that said second party shall at any time fail to keep the improvement upon said premises insured as herein provided, then and in such case said first party shall have the right to take out policies of insurance thereon so as to have at all times the insurance thereon hereinbefore provided for, and all premiums paid by said first party on such policies of insurance, with interest thereon at eight per cent, shall be repaid to said first party by said second party with the installment of rent next falling due thereafter.

And it is further covenanted and agreed by and between the parties hereto, that in the event of the determination of this lease at any time before the expiration of the term of ninety-nine (99) years hereby demised, for the breach of any of the covenants herein contained, then and in such case all the buildings, fixtures and improvements then situate upon said demised premises, shall belong to and be the property of said lessor; and no compensation therefor shall be allowed or paid to said lessee.

It is further covenanted and agreed by and between the parties hereto that within one year before the expiration of this lease, to wit: between the first day of August and the first day of November in the year of our Lord one thousand nine hundred and eighty-four (1984) an appraisal shall be made of the actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises (exclusive of and not including the value of the land or ground) at the time of such appraisal; said appraisal to be made by appraisors appointed and selected in the manner hereinbefore provided for the appointment and selection of appraisors to value the land demised for the purpose of fixing the rental to be paid under the terms of this lease.

It is further mutually agreed between the parties hereto, that if for any cause whatever a valid appraisal of the cash

value of said buildings and improvements shall not be made and completed by appraisors appointed under the provisions hereof, on or before the first day of January in the year of our Lord one thousand nine hundred and eighty-five (1985), then any person or persons at the time interested upon either part or side hereto shall have the right and be entitled to apply to any court of record in said County of Cook, to have said cash value of said buildings and improvements ascertained, and said cash value of said buildings and improvements, when determined and ascertained by the judgment or decree of such court, shall be binding upon all parties concerned in all respects the same as though such cash value had been determined by appraisement under the provisions hereof. In making such appraisement of the value of said improvements, the appraisors or court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant. And the party of the first part covenants and agreed to and with the said party of the second part, that it will, on the first day of August in the year of our Lord one thousand nine hundred and eighty-five (1985) purchase said buildings and improvements then on said demised premises at their fair cash value, determined as aforesaid; said purchase money to be paid in cash at said date. Said appraisal and the payment of said purchase money to be made in gold coin as hereinbefore provided for the appraisal and payment of rent.

And it is further covenanted and agreed by and between the parties hereto, that in the event that the fair cash value of said buildings and improvements on said demised premises shall not have been ascertained and determined as herein provided, on or before the said first day of August, in the year 1985, then and in such case the said party of the second part shall have a lien on said premises and improvements for the payment of the said value of said improvements and buildings when ascertained (with interest thereon at the rate of six per cent per annum from the date when said first party shall have received possession thereof, until the same is paid), notwithstanding the surrender of the possesion thereof to said party of the first part, upon the expiration of this lease. It

being understood that in such case the possession of said buildings and improvements shall be surrendered to said party of the first part on the first day of August in the
112 year 1985, without payment of the value thereof, as hereinbefore provided. And it is further stipulated and agreed that unless the appraised value of said buildings and improvements shall be paid by said first party on the first day of August 1985, or as soon thereafter as the value of said buildings and improvements shall be ascertained and determined under the provisions hereof, then said party of the second part may at once file its bill to enforce the payment thereof, and its lien therefor upon the said premises.

It is further covenanted and agreed between the parties hereto, that each party to the lease shall furnish to the other a name and place to which all notices provided for by this lease may be addressed; which name and place may be changed from time to time, by the respective parties and those claiming under them, and the delivery of a notice to the address so given shall be considered a good and sufficient service of such notice on the party furnishing such address and on all parties claiming an interest under such party.

It is further expressly agreed and covenanted by and between the parties hereto, that in no case shall said party of the first part be liable under an express or implied covenant of this lease for damages caused by or arising from any defect or imperfection in the title of said party of the first part to the premises hereby demised, to an amount in excess of the rent paid to said first party for such period of time as said second party may be compelled by law to pay damages for occupying said demised premises to the person or persons adjudged to be the rightful owners thereof; but in case of the eviction, dispossession or ejectment of said second party from said demised premises by reason of any such defect or imperfection, then and in such case said party of the second part shall not be compelled thereafter to pay any further rent to the party of the first part.

It is further covenanted and agreed that certain articles of agreement between the parties hereto, bearing even date herewith, and executed and delivered contemporaneously with this lease, relating to the use of said demised premises, and the improvements to be placed thereon, shall be construed, together with this lease, as a part of the same transaction, and the rights of the parties shall in all respects be the same

as they would have been if the said articles of agreement had been incorporated into and formed part of this lease.

It is covenanted and agreed by and between the parties hereto, that the party of the second part shall pay all
113 costs and attorney's fees which may be incurred by said party of the first part in enforcing the covenants and agreements of this lease; and also that all the covenants, agreements, rights, privileges, conditions, specifications and recitals in this lease contained, shall extend to and be binding upon the successors and assigns of the respective parties hereto, lessor and lessee, the same as if in every case expressed, and shall be construed as running with the land.

In Witness Whereof said parties have caused there presents to be signed by their Presidents and their Corporate Seals to be hereunto affixed, duly attested by their Secretaries, on the day and year first above written.

STUDEBAKER BROS. MFG. CO.,
By CLEMENT STUDEBAKER,
President.

(Corporate Seal)

J. F. STUDEBAKER,
Secretary.

CHICAGO AUDITORIUM ASSOCIATION,
By FRED W. PECK,
President.

(Corporate Seal)

Attest:
ARTHUR F. TOWNE,
Secretary.

114 St. Joseph County, }
State of Indiana. }

Before me the undersigned a Notary Public in and for said County came Clement Studebaker known to me to be the President of the Studebaker Brothers Mfg. Co. and acknowledged the execution of the within indenture.

Witness my hand and notarial seal this 5th day of February, 1887.

JEREMIAH L. TAYLOR,
Notary Public in and for St. Joseph County, Indiana.

(Notarial Seal)

State of Illinois, } ss.
Cook County. }

I, Charles O. Henthorn, a Notary Public in and for said County in the State aforesaid, do hereby certify that Ferd. W. Peck, personally known to me to the same person whose name is subscribed to the foregoing instrument as President of the Chicago Auditorium Association, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act as such president, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this seventh day of February, A. D. 1887.

CHARLES O. HENTHORN,
(Notarial Seal) *Notary Public.*

Endorsed: Filed June 13, 1923, John H. R. Jamar, Clerk.

June 13. 115 And on to wit: the 13th day of June A. D. 1923, there was filed in the Clerk's Office of said Court a certain Joint and Several Demurrer in words and figures following, to wit:

116 State of Illinois, } ss.
County of Cook. }

IN THE CIRCUIT COURT OF COOK COUNTY IN CHANCERY.

Chicago Auditorium Association }
vs. } Number B-94431
Ambrose Cramer, Trustee, et al. }

The joint and several demurrer of Illinois Trust and Savings Bank, as Trustee under a trust deed from The Corporation of the Fine Arts Building, dated March 5, 1903, and recorded in the office of the Recorder of Deeds of Cook County, in the State of Illinois, as Document Number 3,382,697, in Book 8241 of Records, at page 43; and Illinois Trust and Savings Bank, as Trustee under a trust deed from the Chicago Auditorium Association, dated February 1, 1889, and recorded in said Recorder's Office as Document Number 1,058,-261, in Book 2515 of Records, at page 61; and Illinois Trust

and Savings Bank, as Trustee under a trust deed from Chicago Auditorium Association, dated February 1, 1892, and recorded in said Recorder's Office as Document Number 1,693,-161, in Book 3916 of Records, at page 145.

These defendants by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said bill of complaint, and for cause of demurrer show:

117 1. That it appears from said bill of complaint that the legal holders and owners of the bonds described in and secured by the trust deed from The Corporation of the Fine Arts Building, dated March 5, 1903, and recorded in the office of the Recorder of Deeds of Cook County, in the State of Illinois, as Document Number 3,382,697, in Book 8241 of Records, at page 45, are necessary parties to this suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

2. That said bill of complaint shows that this defendant does not represent the legal holders or owners of the bonds described in or secured by said last mentioned trust deed, but this defendant is a mere mortgage trustee. The rights of said legal holders and owners of said bonds are affected by extraordinary proceedings proposed by the complainant in this cause and they are necessary parties to this suit, and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

3. That said bill of complaint shows that the complainant proposes to demolish and take away all the building which originally constituted the security for the payment of the bonds described in and secured by said last mentioned trust deed; and that complainant promises to substitute another building in place of the one so to be removed. The legal owners and holders of said bonds are vitally interested in the proposed action of the complainant and are entitled to be heard in this court with respect to the terms upon which

118 the complainant shall be allowed, if at all, to take its proposed action. Said bill of complaint does not show that any of said legal holders or owners of said bonds have delegated to this defendant any authority to represent them with respect to such proposed action of the complainant. Such action on the part of the complainant was not contemplated or provided for in the making of said last mentioned trust deed.

The legal holders and owners of said bonds are necessary parties to said suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

4. That is appears from said bill of complaint that the legal holders and owners of the bonds described in and secured by the trust deed from the Chicago Auditorium Association, dated February 1, 1889, and recorded in the office of the Recorder of Deeds of Cook County, in the State of Illinois, as Document Number 1,058,261, in Book 2515 of Records, at page 61, are necessary parties to this suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

5. That said bill of complaint shows that this defendant does not represent the legal holders or owners of the bonds described in or secured by said last mentioned trust deed, but this defendant is a mere mortgage trustee. The rights of said legal holders and owners of said bonds are affected by extraordinary proceedings proposed by the complainant in this cause and they are necessary parties to this suit, and this court can not properly proceed with this cause until they are made defendant hereto and brought into this suit.

6. That said bill of complaint shows that the com-
119 plainant proposes to demolish and take away all the building which originally constituted the security for the payment of the bonds described in and secured by said last mentioned trust deed, and that complainant promises to substitute another building in place of the one so to be removed. The legal owners and holders of said bonds are vitally interested in the proposed action of the complainant and are entitled to be heard in this court with respect to the terms upon which the complainant shall be allowed, if at all, to take its proposed action. Said bill of complaint does not show that any of said legal holders or owners of said bonds have delegated to this defendant any authority to represent them with respect to such proposed action of the complainant. Such action on the part of the complainant was not contemplated or provided for in the making of said last mentioned trust deed. deed. The legal holders and owners of said bonds are necessary parties to said suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

7. That it appears from said bill of complain that the legal holders and owners of the bonds described in and secured by

the trust deed from the Chicago Auditorium Association, dated February 1, 1892, and recorded in the office of the Recorded of Deeds of Cook County, in the State of Illinois, as Document Number 1,693,161, in Book 3916 of Records, at page 145, are necessary parties to this suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

8. That said bill of complaint shows that this defendant does not represent the legal holders or owners of the bonds described in or secured by said last mentioned trust deed,
120 but this defendant is a mere mortgage trustee. The rights of said legal holders and owners of said bonds are affected by extraordinary proceedings proposed by the complainant in this cause and they are necessary parties to this suit, and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

9. That said bill of complaint shows that the complainant proposes to demolish and take away all the building which originally constituted the security for the payment of the bonds described in and secured by said last mentioned trust deed, and that complainant promises to substitute another building in place of the one so to be removed. The legal owners and holders of said bonds are vitally interested in the proposed action of the complainant and are entitled to be heard in this court with respect to the terms upon which the complainant shall be allowed, if at all, to take its proposed action. Said bill of complaint does not show that any of said legal holders or owners of said bonds have delegated to this defendant any authority to represent them with respect to such proposed action of the complainant. Such action on the part of the complainant was not contemplated or provided for in the making of said last mentioned trust deed. The legal holders and owners of said bonds are necessary parties to said suit and this court can not properly proceed with this cause until they are made defendants hereto and brought into this suit.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants, jointly and severally, demur to the said bill and to all the matters and things therein contained and pray the judgment of this Honorable Court whether these defendants, or
121 any of them, shall be compelled to make any further or other answer to the said bill, and these defendants pray

to be dismissed with their reasonable costs in this behalf sustained.

ILLINOIS TRUST AND SAVINGS BANK,
as Trustee under a trust deed from the Corporation of the Fine Arts Building, dated March 5, 1903, *and recorded in the office of the Recorder of Deeds of Cook County, in the State of Illinois, as Document Number* 3,382,697, *in Book* 8241 *of Records, at page* 43;

ILLINOIS TRUST AND SAVINGS BANK,
as Trustee under a trust deed from the Chicago Auditorium Association, dated February 1, 1889, *and recorded in said Recorder's Office as Document Number* 1,058,261, *in Book* 2515 *of Records, at page* 61;

ILLINOIS TRUST AND SAVINGS BANK,
as Trustee under a trust deed from the Chicago Auditorium Association, dated February 1, 1892, *and recorded in said Recorder's Office as Document Number* 1,693,161, *in Book* 3916 *of Records, at page* 145;

By MCCULLOCH, MCCULLOCH & DUNBAR
Their Solicitors.

MCCULLOCH, MCCULLOCH & DUNBAR
Solicitors and of Counsel

(Endorsed) Filed June 13, 1923, John H. R. Jamar, Clerk.

122 And on to-wit: the 13th day of June A. D. 1923, there was filed in the Clerk's Office of said Court a certain Joint and Separate Demurrer in words and figures following, to-wit:

123 State of Illinois } ss:
County of Cook }

Filed J
192

IN THE CIRCUIT COURT OF COOK COUNTY

Chicago Auditorium Association,
Complainant,
vs.
Ambrose Cramer, Trustee, *et al.*,
Defendants.
} In Chancery.
Gen. No. B-94431.

THE JOINT AND SEPARATE, GENERAL AND SPECIAL DEMURRER OF THE DEFENDANTS:

Emily C. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as Trustees under the Last Will and Testament of Charles A. Chapin, deceased; Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, as individuals.

To the Bill of Bill of Complaint of the Chicago Auditorium Association, Complainant:

Now Come the defendants: Emily C. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as Trustees under the Last Will and Testament of Charles A. Chapin, deceased; Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, as individuals, by King,
124 Brower & Hurbut, their solicitors, and, by protestation not admitting the many errors and insufficiencies in the Bill of Complaint contained, say that the allegations of the Bill of Complaint are not sufficient to entitle the complainant to the relief prayed therein, or to any part of such relief; wherefore, said defendants demur to said Bill of Complaint, both generally and specially.

For special grounds of demurrer these defendants say:

First: That the Bill of Complaint does not set forth either the legal substance, or the terms, verbatim, of the Articles of Agreement referred to in the Lease between Studebaker Brothers Manufacturing Company and the Chicago Auditorium Association, being Exhibit 8, to the Bill of Complaint; which Articles of Agreement are stipulated by said Lease to be a part of the same transaction therewith, and of like effect as if the same had been incorporated into said Lease, which is Exhibit 8 to the Bill of Complaint.

Second: Said Bill of Complaint is multifarious, for that it appears from the allegations thereof that the rights and equities of these defendants are different from the rights and equities of the other defendants.

Wherefore, These defendants pray that the Bill of Complaint may be dismissed, as to these defendants, for want of equity; and that these defendants be permitted to go hence without day, with their reasonable costs in this behalf expended.

KING, BROWER & HURLBUT,
Solicitors for said Defendants.

125 State of Illinois } ss:
County of Cook }

SAMUEL B. KING being first duly sworn upon his oath says that he is a member of the firm of solicitors of record for the above named defendants, who has charge of the preparation of the Pleadings of said defendants in this cause. That affiant drew the above and foregoing Demurrer and that affiant verily believes and certifies that, in his opinion, said Demurrer is well founded in point of law; and affiant further says that said Demurrer is not interposed for delay.

And Further, This affiant sayeth not.

SAMUEL B. KING.

Subscribed and Sworn to before me, this 24th day of March, A. D. 1923.

EMIL TARNOPL,
(Seal) *Notary Public.*

(Endorsed) June 13, 1923, John H. R. Jamar, Clerk.

126 And on to-wit: the 13th day of June A. D. 1923, there was filed in the Clerk's Office of said Court a certain Demurrer in words and figures following to-wit:

127 State of Illinois } ss:
County of Cook }

IN THE CIRCUIT COURT OF COOK COUNTY IN CHANCERY

Chicago Auditorium Association,
v.
Ambrose Cramer, Trustee, *et al.* } Gen. No. B94,431.

DEMURRER OF THE DEFENDANTS AMBROSE CRAMER AND MARK SKINNER WILLING, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND OF MARK SKINNER WILLING, INDIVIDUALLY, TO THE ORIGINAL BILL OF COMPLAINT

These defendants, Ambrose Cramer and Mark Skinner Willing, as trustees under the last will and testament of Henry J. Willing, deceased, and Mark Skinner Willing, individually, by protestation, not confessing or acknowledging all or any of the matters and things in the said original bill of complaint contained to be true in such manner and form as the same are therein and thereby set forth and alleged, demur to said original bill of complaint and say that the complainant has not in and by its said original bill made or stated such a case as entitles it to any discovery or any relief from or against these defendants touching the matters contained in said original bill of complaint.

Wherefore, and for divers good causes of demurrer appearing in said original bill of complaint, these defendants demur to the said original bill and to all the matters and things therein contained, and pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to said original bill; and these defendants pray to be dismissed with their reasonable costs in this
128 behalf sustained.

AMBROSE CRAMER and MARK SKINNER WILLING,
as Trustees under the last will and testament of Henry J. Willing deceased,
MARK SKINNER WILLING,
By HAMLIN, TOPLIFF & COOPER,
Their Solicitors.

HAMLIN, TOPLIFF & COOPER
Solicitors for said Defendant.

State of Illinois } ss:
County of Cook }

HOMER H. COOPER, being first duly sworn, deposes and says that the foregoing demurrer is not interposed for purposes of delay.

HOMER H. COOPER,

Subscribed and Sworn to before me, this 3rd day of April, A. D. 1923.

JOE MITCHELL,
(Seal) *Notary Public.*

CERTIFICATE

HOMER H. COOPER, a member of the firm of Hamlin, Hopliff & Cooper, the solicitors for the defendants who have filed the foregoing general demurrer, hereby certifies that in his opinion said demurrer is well founded in point of law.

HOMER H. COOPER,

(Endorsed) Filed June 13, 1923, John H. R. Jamar, Clerk.

129 And on to-wit: the 13th day of June A. D. 1923 there was filed in the Clerk's Office of said Court a certain Petition in words and figures following, to-wit:

130 State of Illinois } ss:
County of Cook }

Chicago Auditorium Association, *a corporation,* Ambrose Cramer, Trustee, *et al.* } In Chancery No. B. 94431

THE PETITION OF CHARLES L. HARRISON, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WILLIAM J. SLATER, DECEASED, FOR REMOVAL OF SAID CAUSE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

To The Honorable Judges of the Circuit Court of Cook County, in Chancery Sitting:

Your Petitioner, Charles L. Harrison, Trustee, under the Last Will and Testament of William A. Slater, deceased,

(said will being mentioned in said bill of complaint) respectfully shows that he is a defendant as such trustee in the above entitled cause; that said suit is a suit of civil nature; that the time for your petitioner to file appearance and answer or other pleading herein has not arrived; that he has filed no such answer or pleading; that said suit is now pending and was commenced by the filing of the bill of complaint herein; that no special bail was originally or is now requisite in this action; that the matter in controversy herein and in the separable controversy hereinafter mentioned exceeds exclusive of interest and costs, the amount, sum or value of $3000.00;

That the citizenship and residence of the parties to said suit material to be here stated and shown is as follows:

Chicago Auditorium Association, complainant, was at the time of filing of suit herein and still is, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business
131 at Chicago, Cook County, Illinois, and a citizen and resident of the said State, and of the Northern District of Illinois, Eastern Division: That your petitioner, Charles L. Harrison, Trustee, was at the time of the filing of said suit, has since been and still is a citizen and resident of the State of Massachusetts and a non-resident of the State of Illinois: That William A. Slater, a defendant, both individually and as Trustee under said Will, was at the time of filing of this suit, has since been and still is a citizen and resident of the State of New York and a non-resident of the State of Illinois: That the defendant, E. Halsey Malone, Trustee under said will, was at the time of filing of said suit, has since been and still is a citizen and resident of the State of New York and a non-resident of the State of Illinois: That the defendants, Bayard Warren and Bayard Tuckerman Jr., Trustees as alleged in said bill, were, and each of them was, at the time of filing suit herein, and each has since been and now is, citizens and residents of the State of Massachusetts, and non-residents of the State of Illinois: That the defendant, Ellen B. Slater, was at the time of filing suit herein, has since been and is now a citizen and resident of the State of New York, and a non-resident of the State of Illinois: That the defendant, Elizabeth Sears Warren, was at the time of filing suit herein, is now, and has at all times since been a citizen and resident of the State of Massachusetts, and a non-resident of the State of Illinois: That the defendant, Phyllis Sears Tuck-

erman, was at the time of filing suit herein, has since been and is now a citizen and resident of the State of Massachusetts and a non-resident of the State of Illinois: That the defendant, Eleanor Malone, was at the time of filing suit herein, is now and at all time has been a citizen and resident of the State of New York, and a non-resident of the State of Illinois.

That the citizenship and residence of the following 132 the defendants to the said bill of complaint, who are each and all minors under the age of eighteen years, was at the time of filing suit herein, has since been and is now, as follows: Elena deStruve, Boris deStruve, Adrian Malone and John Fox Slater, citizens and residents of the State of New York, and non-residents of the State of Illinois: Bayard Warren, Jr., Lily Warren, Camilla Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, citizens and residents of the State of Massachusetts and non-residents of the State of Illinois:

That the Illinois Trust and Savings Bank, made defendant in said bill of complaint as trustee under certain deeds of trust, hereinafter mentioned, was at the time of filing said bill and still is, a corporation organized and existing under and by virtue of the laws of the State of Illinois:

That there is in this suit a controversy which is wholly between citizens of different states, and which is between them alone, and which can be fully determined as between them; that said controversy is of the following nature, to-wit: A controversy as to the rights of the complainant in the real estate mentioned in said bill as "Parcel 2" and the building or buildings thereon: Complainant asserts, and by its bill herein attempts to establish its right, to tear down and remove (on conditions stated in said bill of complaint, but without the consent of your petitioner and the other owners of said "Parcel 2") the buildings which are or may be upon said "Parcel 2": That said "Parcel 2" consists of the following described real estate, to-wit:

Sublots 2, 3, 5 and 6 of Ely and Reynold's Subdivision of Lot 10 in Block 9 in Fractional Section Fifteen Addition to Chicago, together with such portion of an alley about ten feet in width beginning at Congress Street and running north eighty feet, more or less, along the west side of said sublot 3, and also east of and abutting upon sublots 4, 5 and 6 of said

Lot 10, as adjoins or pertains to said sublots 3, 5 and 6:
133 That all the rights or claims of said complainant in said about described premises and the building thereon are derived, as appears from said bill of complaint, through and under the lease to said premises dated January 24, 1887, and made by Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck to said complainant, together with a modification of said lease dated July 10, 1891, copies of which said lease and modification are attached to the said bill of complaint, marked Exhibit 6 and Exhibit 7, respectively, and made a part of said bill:

That your petitioner and William A. Slater Jr., E. Halsey Malone, Bayard Warren and Bayard Tuckerman, Jr., as Trustees, respectively, as set out in the said bill of complaint, have succeeded to the title of said Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck in said real estate known as "Parcel 2", and are now the owners thereof, subject only to said lease and modification, and deny the right of complainant to so tear down or remove such building or buildings;

That the only other parties to this suit having any interest or alleged in said bill to have interest of any nature in said controversy or in the above described premises are the said Ellen E. Slater, Elizabeth Sears Warren, Phyllis Sears Tuckerman, Eleanor Malone, William A. Slater, Jr., individually, Elena deStruve, Boris deStruve, Adrian Malone, John Fox Slater, Bayard Warren Jr., Lily Warren, Camilla Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, herein mentioned as other "Parcel 2 defendants", all of whom as above stated, are citizens either of the State of New York or of the State of Massachusetts and none of whom are citizens or residents of the State of Illinois, and Illinois Trust and Savings Bank, a corporation as aforesaid, as Trustee under two certain mortgage deeds of trust from complainant, one dated February 1, 1889,
134 and the other dated February 1, 1892, (both of said deeds of trust being mentioned in said bill of complaint):

That the interest of said Illinois Trust and Savings Bank in said controversy and in said premises is derived wholly by virtue of said deeds of trust from complainant, and is on the same side of said controversy as complainant, and adverse to your petitioner, and to said William A. Slater, E. Halsey Malone, Bayard Warren, and Bayard Tuckerman, Jr., Trustees, as aforesaid, and said other "Parcel 2 defendants":

That none of said individual defendants have any right or title in said premises, but their only interest is as beneficiaries under one or other of the trusts of which your petitioner and William A. Slater Jr., E. Halsey Malone, Bayard Warren and Bayard Tuckerman Jr., are respectively trustees; that the interests of said Elena deStruve, Boris deStruve, Adrian Malone, John Fox Slater, Bayard Warren Jr., Lily Warren, Camilla Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, or any of them, are merely contingent and that they are not necessary parties to the suit:

That this suit also concerns other controversies involving other leases and agreements and other premises than those above herein described and mentioned, and that neither your petitioner nor William A. Slater Jr., E. Halsey Malone, Bayard Warren, Bayard Tuckerman Jr., trustees as aforesaid, nor any of said other "Parcel 2" defendants above named are or is interested in any of said other controversies nor any of the defendants to said bill herein not mentioned interested in said controversy as to the above mentioned premises, or in the buildings thereon or the alleged rights of the complainant therein.

And your petitioner offers herewith a bond with good and sufficient security in the penal sum of Five Hundred Dol-
135 lars ($500.00) conditioned upon your petitioner entering in the District Court of the United States for the Northern District of Illinois, Eastern Division, within thirty (30) days from the date of filing this petition, a certified copy of the record of this suit and for paying all costs which may be awarded by the said District Court if the said District Court shall hold and determine that this suit was wrongfully or improperly removed thereto:

Your petitioner therefore prays this Honorable Court to proceed no further herein except to accept this petition, approve said bond, and make the order of removal contemplated by law and to cause the record herein to be removed into the said District Court of the United States in and for the Northern District of Illinois, Eastern Division, etc.,

CHARLES L. HARRISON,
Trustee under the last Will and Testament of William A. Slater, deceased.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY
Attorneys for Petitioner.

136 State of Massachusetts }
County of Suffolk } ss:

CHARLES L. HARRISON, being first duly sworn on oath deposes and says, that he is the petitioner above named, and that he signed the foregoing petition; that the foregoing petition is true to his own knowledge.

CHARLES L. HARRISON

Comm of Massachusetts }
Suffoth } ss:

Subscribed and sworn to before me this 12th day of May, A. D. 1923.

I further certify that I am authorized under and by the laws of the State of Massachusetts to administer oaths.

R. C. SKINNER
(Seal) *Notary Public.*

My commission expires April 4, 1930.

(Endorsed) Filed June 13, 1923, John H. R. Jamar, Clerk.

137 THE COMMONWEALTH OF MASSACHUSETTS

• • • •

Office of the Secretary

Boston, May 14, 1923.

I Hereby Certify, That at the date of the attestation hereto annexed, Ross C. Skinner whose name is signed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking the same, a Notary Public for the said Commonwealth duly commissioned and constituted; that to his acts and attestations, as such, full faith and credit are and ought to be given in and out of court; that as such Notary Public, he is by law authorized to administer oaths and take acknowledgments of deeds or conveyances of land, tenements or hereditaments and other instruments throughout the Commonwealth to be recorded according to law; and that I verily

believe his signature to the annexed attestation to be genuine.

In Testimony of which, I have hereunto affixed the Great Seal of the Commonwealth the date above written.

F. W. Cook,

(Seal) *Secretary of the Commonwealth.*

138 And on to-wit: on the 13th day of June A. D. 1923 the following proceedings were had and entered of record in said Court, to-wit:

139 Judge Rush

May 19, 1923

Chicago Auditorium Association
vs.
Ambrose Cramer, *et al* } No. B-94431

ORDER

Charles L. Harrison, trustee under the last will and testament of William A. Slater, deceased, a defendant herein, having within the time provided by law filed his petition for the removal of this cause to the District Court of the United States in and for the Northern District of Illinois, Eastern Division and having at the same time offered his bond in the sum of Five Hundred Dollars ($500) with the Continental Casualty Company a corporation, good and sufficient surety, pursuant to statute and condition according to law, and it appearing that notice of this motion and the filing of said petition has been duly served upon the solicitors of record for the other parties to this suit; Now, therefore, this court does hereby accept and approve said bond and accept said petition and does hereby order that this cause be removed for trial to the said District Court of the United States in and for the Northern District of Illinois, Eastern Division pursuant to the statutes of the United States and that all other proceedings of this court be stayed and that the clerk of this court prepare and deliver to the solicitor for said defendants, for filing in said District Court a certified copy of the record herein.

George Fred Rush,
Judge of the Circuit Court of Cook County.

(Endorsed) Filed June 13, 1923, John H. R. Jamar, Clerk.

140 And on to-wit: on the 13th day of June A. D. 1923, there was filed in the Clerk's Office of said Court a certain Certificate of Clerk of Circuit Court of Cook County, Illinois, in words and figures following, to-wit:

141 State of Illinois } ss:
County of Cook }

I, AUGUST W. MILLER, Clerk of the Circuit Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the Record in a certain cause lately pending in said Court, on the Chancery side thereof, between Chicago Auditorium Association, Complainant, and Ambrose Cramer, et al, Defendants.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 6th day of June, 1923.

AUGUST W. MILLER,
(Seal) *Clerk.*

Fees for Transcript of Record paid by Adams, Follansbee, Hawley & Shorey, Attorneys for
18.00

AUGUST W. MILLER,
Clerk.

(Endorsed) Filed Jun 13, 1923, John H. R. Jamar, Clerk.

142 And on to-wit: the 3rd day of July A, D. 1923 there was filed in the Clerk's Office of said Court a certain Motion to Dismiss in words and figures following, to-wit:

July 3. 143 United States of America }
State of Illinois } ss:

In the District Court of the United States

For the Northern District of Illinois

Eastern Division.

Chicago Auditorium Association,
A Corporation,
Complainant,
vs.
Ambrose Cramer, Trustee, *et al.*,
Defendants.
} In Equity No. 3586.

Come now the defendants, William A. Slater, Charles L. Harrison and Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, deceased, William A. Slater, individually, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren, Phyllis Sears Tuckerman, and Bayard Warren and Bayard Tuckerman, Jr., as Trustees, and move the court to dismiss the bill of complaint herein, for that the facts alleged and set forth in said bill of complaint do not constitute or establish a cause of action in equity as against said defendants, or any of them.

As additional grounds for said motion, these defendants set forth that the bill of complaint herein is insufficient to entitle plaintiff to any relief against these defendants, or any of them, for the following, among other, reasons:

1. Complainant seeks in and by said bill of complaint to have the court enter a declaratory finding, order or decree determining what complainant's and defendants' rights
144 and obligations would be in the event the proposed course of action mentioned and set forth in said bill of complaint, took place;

2. Even if such declaratory finding order or decree were otherwise available or proper, yet said bill of complaint fails to state the proposed course of action with sufficient definiteness so that the court can determine what the rights and obligations of the above named parties to said suit would be in case the proposed course of action were carried out;

3. Said bill of complaint wrongfully joins several dis-

tinct alleged causes of action against defendant parties, contrary to practice in equity, for that it sets out several alleged causes of complaint, each of them relating to rights and obligations arising under different written instruments; that as appears from said bill of complaint, these defendants and certain minor defendants therein named are only interested in the interpretation of two of said instruments both of which affect the premises known and mentioned therein as parcel No. 2; that as appears from said bill of complaint, these defendants and said minor defendants, to-wit, Boris de Struve, Elena de Struve, Adrian Malone, John Fox Slater, Jr., Bayard Warren, Jr., Lily Warren, Camilla Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, are the only defendants interested in the interpretation of said two instruments affecting said parcel No. 2, and none of these defendants or said minors are interested in any way or manner in the interpretation of said other instruments relating to said other parcels of property mentioned in said bill of complaint, namely parcels No. 1 and No. 3, nor are any of the other defendants named in the said bill of complaint interested in or concerned with the in-
145 terpretation of said two instruments which relate to said parcel No. 2;

4. It appears from said bill of complaint that the cloud upon complainant's title, if any exists, so far as these defendants are concerned, arises from and grows out of the terms and conditions of the lease mentioned and set forth in said bill of complaint as "Exhibit 6" and the extension thereof set forth in said bill of complaint as "Exhibit 7", through and under which complainant acquired interest to said property known and mentioned in said bill of complaint as Parcel No. 2.

5. Said bill of complaint is multifarious.

6. Said bill of complaint is uncertain and indefinite.

Wherefore, said defendants pray that the said bill of complaint herein be dismissed, at complainant's costs, as to them and each of them.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY,
Solicitors, and of counsel for defendants above named.
SAMUEL ADAMS
JOHN E. GALVIN
Of counsel for said Defendants.

(Endorsed) Filed July 3, 1923, John H. R. Jamar, Clerk.

Nov. 23. 146 And on to-wit: the 23rd day of November A. D. 1923 the following proceedings were had and entered of record in said Court as follows, to-wit:

147 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

Friday, November 23, 1923.

Present: Hon. James H. Wilkerson, Judge of Said Court.

Chicago Auditorium Association
vs.
Ambrose Cramer, *et al.* } 3586

This day comes Messrs. King, Brower & Hurlbut, and suggest the minority of the Defendants: Henry Kent Chapin, Jr., Charles A. Chapin, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Elizabeth Chalifoux Chapin and Coolidge Meade Chapin.

It Is Ordered that Henry Russell Platt, Esq., be and he hereby is appointed Guardian Ad Litem for said minors.

Whereupon, the said Solicitor's suggest the death of the defendant, Chester Crandall Chapin (a minor at the time of his death); and further suggest the majority of the defendant, Charlotte Gardiner Robertson, who was a minor at the time of the filing of the Bill of Complaint.

Dec. 12. 148 And on to wit: the 12th day of December A. D. 1923 the following proceedings were had and entered of record in said Court in words and figures following, to wit:

149 * * * * * *

Wednesday, December 12, 1923.

Present: Hon. James H. Wilkerson, Judge of Said Court:

On motion of defendant's Attorney It Is Ordered that the demurrer of the defendants, Ambrose Cramer and Mark Skinner Willing as trustees under the Last Will and Testa-

ment of Henry J. Willing, deceased, and of Mark Skinner Willing, individually, heretofore filed prior to removal of cause from Courts of State of Illinois to United States District Court, stand as the motion of said defendants to dismiss the original bill of complaint herein.

It Is Further Ordered that the hearing on said motion to dismiss be and the same is hereby set at 2 P. M. Monday, January 7, 1924; and

It Is Ordered that Louis M. Greely, Esq., be and he hereby is appointed guardian ad litem for the minor defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

150 And on to wit: the 5th day of March A. D. 1926, there was filed in the Clerk's Office of said Court a certain Amendments To Bill, in words and figures following, to wit: Filed 192

(Nunc pro tunc as of December 28, 1923.)

152 * * * * * *

AMENDMENTS TO BILL.

By leave of court first obtained, the complainant comes and amends its bill of complaint in this cause as follows:

First.

By adding to paragraph 5 of said bill of complaint at the foot thereof, immediately after the final subparagraph thereof ending with the words "Studebaker leasehold interest," upon page 11 of said bill as printed, the following subparagraph:

As appears from recitals in said Exhibit 8, the said Studebaker Brothers Manufacturing Company and your orator entered into certain articles of agreement of even date with
153 the above mentioned Studebaker leases and referred to in each of said leases as a part of the same transaction with such lease with like effect as if incorporated into and forming a part of such lease. The said articles of agreement were filed for record in the office of the Recorded of Cook County, Illinois, July 19, 1887, and were there recorded in Book 2079 of Records, at page 390, as Document No. 852542; and a true

copy thereof, with the exception of the plans and specification referred to therein, is attached hereto, marked "Exhibit 9," and is made a part of this bill of complaint. Afterwards a certain other agreement was entered into between said Studebaker Brothers Manufacturing Company and your orator, dated September 30, 1887, purporting to be supplementary to said articles of agreement of February 1, 1887, and to modify the terms thereof, which supplementary agreement was filed for record in the office of the Recorder of Cook County, Illinois, January 6, 1888, and was there recorded in Book 2170 of Records at page 479, as Document No. 911452, and a true copy thereof is hereto attached, marked "Exhibit 10," and is made part of this bill of complaint. At the time of the making of said Studebaker leases, and of each of the aforesaid agreements of which said Exhibits 9 and 10 are copies, said Studebaker Brothers Manufacturing Company owned not only said lots eighteen (18) and nineteen (19), but also the premises lying next north of and adjacent thereto and described as lots thirteen (13), fourteen (14), fifteen (15), sixteen (16) and seventeen (17) in the Assessor's Division aforesaid, and said lots thirteen (13) to nineteen (19), both inclusive, in said Assessor's Division constituted all of the property of said Studebaker Brothers Manufacturing Company to which said agreements or either of them purported to or did in fact relate. The Auditorium Building was erected in such manner as to protect and preserve the easements in favor of said Studebaker Brothers Manufacturing Company and its property aforesaid reserved or given by said agreements. The existence of the easements aforesaid in and over said lots eighteen (18) and nineteen (19) or either of them are not taken into consideration in determining the fair cash value thereof from time to time for the purpose of fixing the rent payable under the Studebaker leases, but it has been set-
154 tled in a proceeding by which all parties are bound that the fair cash value of said lots is, under the terms of said leases, to be determined by appraisal from time to time without any deduction or allowance on account of the easements aforesaid. Your orator does not in or by this bill of complaint or any proceedings in this cause, claim or seek to establish any right to interfere with or impair said easements given by or arising from the agreements hereinabove in this paragraph referred to or any other easements, if any such there be, in or over said Studebaker property; and your orator consents and prays that any decree entered in this cause

with respect to your orator's right to remove the building now on said premises shall be expressly subject to the condition that whatever easements in or over said Studebaker property may lawfully exist under said agreements or otherwise shall be in no manner impaired or affected by said decree.

Second.

By striking from paragraph 8 of said bill of complaint, in lines 10 and 11 of said paragraph on page 15 of the bill as printed, the words "who at the time of his death owned said Studebaker property in fee simple," and by inserting in said paragraph 8, in lieu of the words so striken, the following:
who acquired title to said Studebaker property, and also to lots thirteen (13) to seventeen (17) both inclusive in said Assessor's Division, by purchase and conveyance on or about March 27, 1915, and they still own the fee of the entire tract aforesaid, consisting of lots thirteen (13) to nineteen (19) both inclusive in said Assessor's Division, and hold it upon the trusts created by the last will and testament of said Charles A. Chapin, deceased; and the persons in this paragraph named as owners of or interested in said Studebaker property are to the same extent the owners of and only persons interested in said lots thirteen (13) to seventeen (17) both inclusive.

155 **Third.**

By striking from said paragraph 8 the concluding words thereof, being the last six lines of said paragraph in the bill as printed, and reading:
"Said bonds were due serially upon various dates up to and including March 1, 1933; and a considerable portion of said bonds are now outstanding in the hands of numerous holders and owners to your orators unknown; and the said trustee, Illinois Trust and Savings Bank, fully represents the legal holders and owners of all of said outstanding bonds,"
and by inserting at the end of said paragraph 8, in lieu of the words so stricken, the following:
More than six hundred (600) of said bonds have not yet matured by their terms as set forth in said trust deed, and your orator is informed and believes, and therefore alleges, that at least that many of said bonds are outstanding in the hands of numerous holders thereof, most of whom are to your

orator unknown. Said trustee, Illinois Trust and Savings Bank, maintains that it has no authority to represent them in this cause, and your orator desires therefor to bring said bondholders before the court otherwise than by representation through said trustee, but they constitute a class so numerous as to make it impracticable to bring them all before the court in person. The question involved in this cause, however, is one of common and general interest to all the bondholders constituting said class, and Albert W. Harris, First Trust and Savings Bank, a corporation of the State of Illinois, George Higginson, Jr., and Columbus Healy, each of whom is the holder and owner of a substantial amount of said outstanding bonds, are persons fairly representative of said entire class, and their interests in this cause are substantially identical with the interests of all other members thereof; and they are hereinafter made defendants to this bill of complaint as representatives of all the members of said class, to the end that they may defend herein for the whole class aforesaid.

156 Fourth.

(1) By striking from paragraph 9 of said bill of complaint the last subparagraph thereof, beginning with the words, "The holders of the outstanding bonds issued by your orator," and ending with the words "the trustee named herein," being the last eleven lines on page 18 of said bill as printed.

(2) By inserting in said paragraph 9 at the end of the first subparagraph thereof, on page 17 of said bill as printed, immediately after the words "eight hundred and thirty-four thousand dollars ($834,000) par value of said bonds and no more," the following:

The holders of said outstanding bonds are very numerous and most of them are to your orator unknown. Said trustee, Illinois Trust and Savings Bank, maintains that it has no authority to represent them in this cause, and your orator desires therefore to bring said bondholders before the court otherwise than by representation through said trustee, but they constitute a class so numerous as to make it impracticable to bring them all before the court in person. The question involved in this cause, however, is one of common and general interest to all the bondholders constituting said class, and Caroline P. McCready, Alfred L. Baker, Edwin A. Seipp, and The Northern Trust Company, as Trustee under the last will

and testament of Edward W. McCready, deceased, each of whom is the holder and owner of a substantial amount of said outstanding bonds, and each of whom is a citizen of the State of Illinois, are fairly representative of said entire class, and their interests in this cause are substantially identical with the interests of all other members thereof; and they are hereinafter made defendants to this bill of complaint as representatives of all the members of said class, to the end that they may defend herein for the whole class aforesaid.

(3) By inserting in said paragraph 9 at the end of the second subparagraph thereof, on page 17 of said bill as printed, immediately after the words "five hundred and
157 forty-one thousand dollars ($541,000) par value of said consolidated mortgage bonds," the following:

The holders of said outstanding bonds are very numerous and most of them are to your orator unknown. Said trustee, Illinois Trust and Savings Bank, maintains that it has no authority to represent them in this cause, and your orator desires therefore to bring said bondholders before the court otherwise than by representation through said trustee, but they constitute a class so numerous as to make it impracticable to bring them all before the court in person. The question involved in this cause, however, is one of common and general interest to all the bondholders constituting said class and Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp, Alfred L. Baker, and The Northern Trust Company as Trustee under the last will and testament of Adele C. Stone, deceased, each of whom is the holder and owner of a substantial amount of said outstanding bonds, and each of whom is a citizen of the State of Illinois, are fairly representative of said entire class, and their interests in this cause are substantially identical with the interests of all other members thereof; and they are hereinafter made defendants to this bill of complaint as representatives of all the members of said class, to the end that they may defend herein for the whole closs aforesaid.

Fifth.

By striking from paragraph 20 of said bill of complaint all of said paragraph from the beginning thereof to and including the words "by the terms of their respective leases" in the ninth line of page 32 of said bill as printed, and by inserting in lieu of the language so stricken the following:

20. To avert such loss and the forfeiture of the leasehold

interests aforesaid, your orator desires and proposes to remove from the Auditorium property the present building and improvements, except so much thereof, if any, as may be necessary to protect and preserve the easements in and over the Studebaker property aforesaid, and to erect in their place
158 an adequate modern steel construction building at a cost of not less than Ten Million Dollars ($10,000,000) adapted for a hotel, auditorium, and safety deposit vaults. Said proposed building, when erected, will yield to your orator an adequate net income which will enable your orator to meet its necessary rent, interest and other charges, and to avert such loss and such forfeiture of its leasehold interests, and to realize the value of its said leasehold interests. The value of the proposed improvement upon each of the several leasehold properties hereinabove described would be greatly in excess of the value of the present improvement thereon. Plans are now under consideration by your orator for the erection of a building on said site of the character and at the cost aforesaid, representing the highest type of modern construction and arrangement, preserving and increasing the security of all of the lessors interested in the several leases aforesaid. Your orator is prepared to undertake and complete such a new improvement, and is able to obtain the necessary funds and financial backing to do so; and your orator is ready and willing, and hereby offers, before carrying out such plans or removing or disturbing the present building for that purpose, to give such adequate security as is equitable and as shall be directed by the court for the erection and completion of a new improvement or improvements of the character, cost, and description above defined, and to comply with any other equitable terms and conditions prescribed by the court, to the end that the lessors, or their heirs, successors and assigns, and all other parties interested, shall continue always to have all and every protection and security in their several rights by them enjoyed under the terms of their respective leases or otherwise.

Sixth.

(1) By striking from paragraph 21 of said bill of complaint, in the fifth, sixth and seventh line of page 34 of said bill as printed, the words:

"and said bondsholders are fully represented herein by the Illinois Trust and Savings Bank, as trustee under said trust deed";

159 (2) Also by striking from said paragraph 21 the final sentence thereof, reading as follows:

"Said bondholders are, however, fully and adequately represented herein by the trustee, under said mortgage deeds of trust, the said Illinois Trust and Savings Bank."

Seventh.

(1) By striking from paragraph 23 of said bill of complaint, immediately after the figures "3382697," in the seventh line of page 36 of said bill as printed, the words, "and as representative," and by inserting in lieu thereof the words: "and Albert W. Harris, First Trust and Savings Bank, George Higginson, Jr., and Columbus Healy in their own right and as representatives."

(2) Also by striking from said paragraph 23, immediately after the figures "1693161," in the sixteenth line of page 36 of said bill as printed, the words "and as representative of the legal holders and owners of all bonds secured by said mortgage deeds of trust," and by inserting in lieu thereof the following:

"also Caroline P. McCready, Alfred L. Baker, Edwin A. Seipp, and The Northern Trust Company as Trustee under the last will and testament of Edward W. McCready, deceased, in their own right and as representatives of the legal holders and owners of all bonds secured by said mortgage deed of trust recorded as Document No. 1058261, and Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp, Alfred L. Baker and The Northern Trust Company as Trustee under the last will and testament of Adele C. Stone, deceased, in their own right and as representatives of the legal holders and owners of all bonds secured by said deed of trust recorded as Document No. 1693161."

160 Eighth.

By inserting in paragraph 23 of said bill of complaint, in the second line on page 37 of said bill as printed and immediately after the words "all buildings which for the time being may be upon said premises," the following:

subject to the preservation and protection of said easements in the Studebaker property and

FISHER, BOYDEN, KALES & BELL,
Solicitors for Complainant.

WALTER L. FISHER,
WILLIAM W. CASE,
Of Counsel.

161 EXHIBIT 9.

Articles of Agreement, Made and entered into the First day of February, A. D. 1887 between the Studebaker Brothers Manufacturing Company, a corporation organized under the laws of the State of Indiana, party of the first part, and the Chicago Auditorium Association, a corporation organized under the laws of the State of Illinois, party of the second part,

Witnesseth, That in consideration of the execution by the parties hereto of two certain ground leases bearing even date herewith by which said party of the first part demises and leases to said party of the second part all those premises situated in the City of Chicago, County of Cook and State of Illinois, known and described as Lots Eighteen (18) and Nineteen (19) in the Assessor's Division of Lots One (1), Two (2), Three (3), Four (4), Five (5) and Eight (8) in Block Nine (9) in Fractional Section Fifteen (15) Addition to Chicago, and in consideration of the premises and agreements herein contained it is hereby mutually covenanted and agreed as follows, viz:

First. The said party of the second part covenants and agrees that it will construct and maintain during the term demised by said leases, a driveway not less than Fifteen (15) feet in width along and upon the North side of said demised premises and adjacent to the premises now owned by said party of the first part lying next North of said demises premises, which said driveway shall extend from the West line of Michigan Avenue to the West line of said demises premises, and that said parties of the first part and the occupants and owners of the premises lying next North and adjacent to said demised premises shall during the entire existence of the term demised by said ground leases have a right to use said driveway without contributing to the cost or expense of maintaining the same and that the right to use said driveway shall not be granted by said party of the second part to any other persons than its own successors and assigns and persons occupying or claiming through or under it or them, except by the mutual consent of the parties hereto.

Second. Said party of the first part hereby gives to said party of the second part the right to join to and use so much

of the South wall of its building upon the premises next
162 North of and adjoining to said demised premises as shall be beneath the level of said driveway, with the right to cut into said wall not to exceed Eight (8) inches for the purpose of affording support to the end of the beams upon which said driveway shall be constructed.

Third. Said party of the second part covenants and agrees that the East Seventeen (17) feet and Six (6) inches of the North Fifteen (15) feet of Lot Eighteen (18) here described shall be at all times kept free and clear of all buildings, improvements and obstructions of every kind and nature above the driveway hereinbefore mentioned.

Fourth. Said party of the first part covenants that said party of the second part shall have the right to join to and use so much of the West Thirty-four (34) feet and Eight (8) inches of the East Fifty-two (52) feet and Two (2) inches West of the West line of Michigan Avenue of the South wall of the building next North and adjoining to said demised premises as shall be above the driveway hereinbefore provided for, upon condition that said portion of said wall shall be joined to and used in such manner as not to injure said wall or the building of which it forms a part, provided it shall be joined to at the same time as the erection of the main building upon said demised premises. Any windows that are now in said wall within the space described above may in case of the use of said wall by the party of the second part, be removed and filled with masonry by said second party; in which case said second party shall finish the north side of the bricked up windows to correspond with other portions of the inside of said wall.

Fifth. Said party of the second part covenants and agrees that said party of the first part shall have the right to build over so much of the West ninety-six (96) and one-half (½) feet of so much of said demised premises as lies North of the North main wall proposed to be built upon said demised premises as shown upon the plans prepared by Messrs. Adler & Sullivan, a copy whereof is attached to this contract; the buildings to be constructed by said party of the first part under this clause to be wholly above the fourth story of the building to be erected upon said demised premises by said party of the second part, as shown upon the said plans above mentioned, and to be constructed of material and in a manner equally fireproof with that used by said party of the second

part in construction of its buildings upon said demised
163 premises at the same height, and said buildings or extension may be supported by columns resting upon the north wall of the dressing room; and said party of the second part further covenants and agrees that said party of the first part in so building upon said demised premises shall have the right to join to and add to the height of the North main wall of the building erected by said party of the second part upon said demised premises, said right to add to the height of said wall being given, however, upon the following express conditions, to wit:

1st: That said party of the first part shall within twenty (20) days after the execution of this agreement notify said party of the second part in writing of its election to add to the height of said wall, giving the specifications of such porposed addition to said wall.

2nd: That the additions to said wall shall be made and completed within sixty days after said party of the second part shall have completed the construction of said North wall and given notice of such completion to said party of the first part.

3rd: That said wall shall not by said additions be carried to a greater height than the present height of the South wall of the building owned by said party of the first part next North and adjacent to said demised premises.

4th: That no openings shall be left in the addition in height to said wall.

5th: That any openings through the South wall of the building of the party of the first part connecting said building with the extension on the driveway before described shall be protected with iron shutters on both sides of said wall, and all openings or windows in the east and west walls of said extension shall be protected with iron shutters.

Sixth. The plans and specifications attached hereto marked "Exhibit A," consisting of seven (7) sheets, are made part of this contract, and this contract is to be construed in regard to the improvements to be placed upon said demised premises with reference to said plans and the measurements shown thereon, it being covenanted and agreed that said plans form a part of this contract, said party of the second part reserving the right, however, to move its chimney stack and the West wall of the hotel building, being the wall East of the court passage way and also the West wall of its Dressing

Room Building, being the wall next East of the West line
164 of said premises, five (5) feet, more or less, farther to the East than shown upon said plans; and it is further covenanted and agreed that said party of the first part shall have the right to keep and maintain the South wall of its building next North of and adjacent to said demised premises hereinbefore described as now built.

It is further covenanted and agreed by and between the parties that these articles of agreement and all of the provisions thereof shall extend to and be binding upon their successors and assignees respectively, and the rights of the parties hereto shall be in all respects the same as though the provisions herein contained had been incorporated into the ground leases hereinbefore mentioned.

In Witness Whereof, said parties have caused these presents to be signed by their Presidents and their corporate seals hereto attached, and to be attested by their Secretaries the day and year first above written.

STUDEBAKER BROS. MFG. CO.,
By CLEMENT STUDEBAKER,
President.

(Corporate seal)

J. F. STUDEBAKER,
Secretary, (Seal)

CHICAGO AUDITORIUM ASSOCIATION,
By FERD. W. PECK,
President.

(Corporate seal)

Attest:
ARTHUR F. TOWNE,
Secretary.

165 State of Indiana, }
St. Joseph County. } ss.

Before me the undersigned a Notary Public in and for said County came Clement Studebaker, known to me to be the President of the Studebaker Bros. Mfg. Co. and acknowledged the execution of the within agreement.

Witness my hand and notarial seal this 5th day of February, 1887.

JEREMIAH L. TAYLOR,
Notary Public in and for St. Joseph County, Indiana.

(Notarial Seal)

State of Illinois, }
Cook County, } ss.

I, Charles O. Henthorn, a Notary Public in and for said County in the State aforesaid, do hereby certify that Ferd. W. Peck, personally known to me to be the same person whose name is subscribed to the foregoing instrument as President of the Chicago Auditorium Association, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act as such President, for the uses and purposes therein set forth.

Give under my hand and Notarial Seal this seventh day of February A. D. 1887.

CHARLES O. HENTHORN,
Notary Public.

(Notarial Seal)

166 EXHIBIT 10.

The following Agreement, entered into this 30th day of Sept. 1887, between the Studebaker Brothers Manufacturing Company, a corporation organized under the laws of the State of Indiana, party of the first part, and the Chicago Auditorium Association, party of the second part, is intended to be supplementary to a certain agreement entered into between the same parties on the first day of February, A. D. 1887, and recorded in the Record's Office of Cook County, Illinois, on July 19, 1887, as Document No. 852542.

It is the intention of this Supplementary Agreement to so modify the paragraph marked "Sixth" in said original agreement that for the purpose of securing a suitable enclosure for an organ, which both parties hereto wish to see placed in the Auditorium now being built by the party of the second part, the said party of the second part shall be permitted to deviate from the plans forming part of said Document No. 852542 in the following described manner, to wit: That the said enclosure for said organ may be built at a height of not less than fourteen (14) feet above the grade of the driveway described in said Document No. 852542, provided always, however, that no part of the same shall in any way encroach upon or interfere with the extension of the building of the party of the first part over said driveway and other premises of the

party of the second part as such extension is described in the paragraph marked "Fifth" in said Document No. 852542.

It is agreed upon that the foregoing modification of the agreement herein referred to shall extend to and be binding upon the successors and assigns of the parties hereto.

In Witness Whereof said parties have caused these presents to be signed by their presidents and their seals here-
167 unto attached, and to be attested by their secretaries, the day and year first above written.

CLEM STUDEBAKER,
President.

Sept. 30, 1887
(Corporate Seal of Stude-)
(baker Bros. Mfg. Co.)
Attest:
J. F. STUDEBAKER,
Secretary.

CHICAGO AUDITORIUM ASSOCIATION,
By FERD. W. PECK,
President.

(Corporate Seal of Chicago)
(Auditorium Association)
Attest:
ARTHUR F. TOWNE,
Secretary.

168 And on to wit: the 28th day of December A. D. 1923 the following proceedings were had and entered of record in said Courts in words and figures following, to wit: Enter 28,

169 • • • • • •

Friday, December 28, 1923.

Present: Hon. Adam C. Cliffe, Judge of Said Court:

On motion of the solicitors for the Complainant, it is ordered that leave be and it hereby is given to the Complainant to file in this cause instanter amendments to its bill of complaint in this cause, and said amendments being now filed, it is further ordered that a writ of subpoena issue out of the office of the Clerk of this Court directed to the defendants Albert W. Harris, First Trust and Savings Bank, George Higginson, Jr., Columbus Healy, Caroline P. McCready, Alfred

L. Baker, Edwin A. Seipp, The Northern Trust Company as Trustee under the last will and testament of Edward W. McCready, deceased, Charles S. Dewey, William C. Seipp, Clarence T. Seipp, and The Northern Trust Company as Trustee under the last will and testament of Adele C. Stone, deceased, commanding them to appear and answer or otherwise defend the bill of complaint in accordance with the law and rules and practice of this Court.

It is further ordered that the demurrer of the defendant Illinois Trust & Savings Bank (now Illinois Merchants Trust Company and the motions of the defendants represented herein by King, Brower & Hurlburt, and by Adams, Follansbee, Hawley & Storey, to dismiss the bill of complaint stand as motions of said respective defendants to dismiss the bill of complaint as amended, and that the other defendants who have appeared in this cause and demurred to the bill of com-
170 plaint in the Circuit Court of Cook County, or moved in this Court to dismiss said bill of complaint, do answer or move to dismiss the bill of complaint as now amended on or before the third day of January, 1924.

Enter:

ADAM C. CLIFFE,
Judge of Said Court.

Dec. 31. 171 And on to wit: the 31st day of December A. D. 1923 there was filed in the Clerk's Office of said Court a certain Answer of Henry Russell Platt, Guardian Ad Litem in words and figures following, to wit:

172 • • • • • •

THE ANSWER OF HENRY KENT CHAPIN JR., CHARLES A. CHAPIN, HOLLAND BISHOP, RUBY BISHOP, CHARLES CHAPIN BISHOP, ELIZABETH CHALIFOUX CHAPIN AND LOWELL MEADE CHAPIN, MINORS, DEFENDANTS IN THE ABOVE ENTITLED PROCEEDINGS, BY HENRY RUSSELL PLATT, THEIR DULY APPOINTED GUARDIAN AD LITEM, TO THE BILL OF COMPLAINT AS AMENDED OF THE CHICAGO AUDITORIUM ASSOCIATION.

Now come Henry Kent Chapin Jr., Charles A. Chapin, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Elizabeth

Chalifoux Chapin and Lowell Meade Chapin, minors, by Henry Russell Platt, their duly appointed Guardian Ad Litem, and answering the bill of complaint filed by the Chicago Auditorium Association in the above entitled matter say:

That said Henry Kent Chapin Jr., Charles A. Chapin, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Elizabeth Chalifoux Chapin and Lowell Meade Chapin are minors, that said minors have no knowledge of the allegations and mat-
173 ters contained in said bill of complaint as amended and therefore submit their rights and interests in the matter in question in this cause to the tender consideration and protection of this Honorable Court and pray strict proof of the matters and things alleged by the complainant in said bill of complaint as amended.

HENRY RUSSELL PLATT,
Guardian Ad Litem.

Endorsed. Filed December 31, 1923, John H. R. Jamar, Clerk.

174 And on to wit: the 2nd day of January A. D. 1924 there was filed in the Clerk's Office of said Court a certain Motion To Dismiss in words and figures following, to wit: Filed 1923

175 * * * * * *

MOTION TO DISMISS.

And Now come Ambrose Cramer and Mark Skinner Willing, trustees under the last will and testament of Henry J. Willing, deceased, and Mark Skinner Willing individually, by Samuel Topliff and Homer H. Cooper, their solicitors, and move the court to dismiss the bill of complaint herein as amended for the following reasons:

First: Because this court is without jurisdiction of the subject matter of the case, made or attempted to be made by said bill, as amended.

Second: Because the case made or attempted to be made by said bill, as amended, is not within the jurisdiction of a court of equity.

Third: Because the said amended bill is multifarious, in that it joins as co-defendants with these defendants persons not interested in or with respect to the so-called Walker

leases; in which alone and in the premises thereby demised, these defendants are interested; but in other and different leases, by other lessors demising other and different
176 premises to the complainant herein.

Fourth: Because the bill, as amended, fails to join certain necessary parties, that is to say, all of the holders of the various bonds secured by trust deeds to the Illinois Trust and Savings Bank as trustee of the leasehold estate of said complainant under said Walker leases, except such holders of various bonds as are joined as defendants by the amendments to said bill.

Fifth: Because the said bill of complaint, as amended, states no case entitling the complainant to the relief therein prayed or to any part thereof, or to any relief in equity against these defendants or any or either of them.

Sixth: Because said bill of complaint, as amended, states no case entitling the complainant to any remedy or relief against these defendants or any or either of them, either at law or in equity.

AMBROSE CRAMER,
MARK SKINNER WILLING,
Trustees under the last will and testament of Henry J. Willing, deceased.

MARK SKINNER WILLING,
By SAMUEL TOPLIFF,
HOMER H. COOPER.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Ambrose Cramer and Mark Skinner Willing, Trustees under the last will and testament of Henry J. Willing, Deceased and Mark Skinner Willing.

Endorsed. Filed January 2, 1924, John H. R. Jamar, Clerk.

177 And on to wit: the 2nd day of January A. D. 1924, there was filed in the Clerk's Office of said Court a certain Motion To Dismiss in words and figures following, to wit:

178 * * * * * * *

MOTION TO DISMISS.

And now comes the defendants, Margaret Willing, Evelyn Pierrepont Willing, and Mark Skinner Willing, Jr., infants under legal age, by Louis M. Greeley, their guardian ad item, and move the court to dismiss the bill of complaint herein as amended for the following reasons: Filed Ja 1924.

1. Because the said bill of complaint as amended states no case entitling the complainant to the relief therein prayed or to any part thereof, or to any relief in equity against these defendants or any or either of them.

2. Because the said bill as amended is multifarious in that it joins as co-defendants with these defendants, persons not interested in or with respect to the so-called Walker leases (in which alone and in the premises thereby demised these defendants are interested), but in other and different leases by other lessors demising other and different premises.

3. Because the bill as amended fails to join certain necessary parties, to wit, all the holders of the various bonds secured by the trust deeds in said bill referred to to the Illinois Trust and Savings Bank as trustee of the leasehold inter-
179 est of complainant under the Walker leases, other than such holders as are joined as defendants by the amendments to said bill.

4. Because said bill as amended states no case entitling complainant to any remedy or relief against these defendants or any of them, either at law or in equity.

5. Because this court is without jurisdiction of the subject matter of the case made or attempted to be made by said bill as amended.

6. Because the case made or attempted to be made by said bill as amended is not within the jurisdiction of a court of equity.

7. And for other good and sufficient reasons.

MARGARET WILLING,
EVELYN PIEREPONT WILLING and
MARK SKINNER WILLING, JR.,
By LOUIS M. GREELEY,
Their guardian ad litem.
LOUIS M. GREELEY,
Soli. & of Counsel.

R. 611. 35 N. Dearborn St., Chicago, Ill. Tel. Central 1717.

Endorsed: Filed January 2, 1924, John H. R. Jamar, Clerk.

Apr. 4. 180 And on to-wit: the 18th day of April A. D. 1924, the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

181 * * * * * *

Friday, April 18, 1924.

Present: Hon. James H. Wilkerson, Judge of Said Court.

This day again come the parties to this suit by their attorneys respectively, and the Court having heretofore heard the arguments of counsel on the defendants motion to dismiss, and the same having been taken under advisement and being now fully advised in the premises It Is Ordered that the motion to dismiss be and the same is hereby denied.

It Is Further Ordered that the defendants be and they are hereby required to answer herein within twenty days from this date, and

It Is Further Ordered that this cause be and the same is hereby set for trial June 2, 1924.

18. 182 And on to-wit: the 18th day of April A. D. 1924, there was filed in the Clerk's Office of said court a certain Decision On Motion to Dismiss in words and figures following, to-wit:

183 * * * * * *

DECISION ON MOTION TO DISMISS.

I have given careful consideration to the arguments presented upon this motion, as well as to the briefs which have been filed.

The motion to dismiss takes the place of a demurrer under the chancery practice before the adoption of the new rules, and the questions which have been presented must be governed by the scope of such a hearing.

For the purposes of such a hearing, and through a fiction of law universally adopted, a general demurrer admits all the material facts averred in the bill, including averments describing the phrases and circumstances of the subject matter put in controversy by the bill; and, whatever may have

been the ancient practice, the modern trend of judicial decision is against the idea of attempting to settle substantive rights upon such a hearing, except in cases where the subject matter in controversy is of such a nature as to make it clear that comprehensive and complete justice can be done in the narrow field presented by the allegations of the bill; and the rule governing modern procedure and practice goes unchallenged that ultimate rights will not be established on bill and demurrer, unless it is clear upon the most favorable aspect of the admitted facts that no case is stated by the bill. The general principle is thus stated in Daniell's Chancery Pleading and Practice:

184 "A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing, but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the court to modify the relief or to grant no relief at all, the court, although it sees that the granting the modified relief, at the hearing will be attended with considerable difficulty, will not support a demurrer."

I shall not undertake to subject the bill to minute examination and analysis at this time. It is proper for me to say, however, that I have studied it carefully and have not only considered the very able briefs which have been submitted by counsel, but have tried to make an independent examination of some of the interesting questions involved. I am strongly impressed with the conviction that the situation under consideration is one which falls short of justifying an attempt to establish ultimate rights upon a motion to dismiss.

Kansas v. *Colorado*, 185 U. S. 125, 144;
Virginia v. *West Virginia*, 206 U. S. 290, 321;
Ralston Steel Car Co. v. *National Dump Car Co.*, 221 Fed. 590, 592;
Clinchfield Coal Corporation v. *Steinman*, 217 Fed. 875, 877;
Foster-Eddy v. *Baker*, 192 Fed. 624, 626;
Sabre v. *United Traction and Electric Co.*, 156 Fed. 79, 83;
Rankin v. *Miller, et al*, 130 Fed. 229.

The arguments upon the alleged merits and demerits of the bill upon this hearing on the motion to dismiss, which,

for the purpose of such a hearing, admits the truth of all that is alleged, at once present important and difficult questions of law and different understandings of the parties as to the substance and effect of the allegations of the bill in respect to law as well as fact.

The bill of complaint presents questions which I think should go to answers and proofs, without prejudice to any question raised by either party touching this motion.

The motion to dismiss is denied and defendants are ruled to answer within twenty days, and the case is placed on the trial calendar for the first Monday in June.

JAMES H. WILKERSON,
April 18, 1924. *United States District Judge.*

(Endorsed) Filed April 18, 1924, John H. R. Jamar, Clerk.

25, 185 And on to-wit: the 25th day of April A. D. 1924, there was filed in the Clerk's Office of said Court a certain Amendment and Supplement in words and figures following to-wit:

186 * * * * * * *

AMENDMENTS AND SUPPLEMENT TO BILL OF COMPLAINT.

Filed April 25, 1924.

By leave of court first obtained the plaintiff comes and again amends its bill of complaint in manner following:

1. By striking therefrom the name Alfred L. Baker wherever it occurs in said bill as amended.

2. By inserting immediately after the name "Caroline P. McCready" in paragraph 9 and likewise in paragraph 23 of said bill as amended the words "The Northern Trust Company, as Trustee under the last will and testament of Mary E. Shields, deceased."

And by like leave of court first obtained the plaintiff represents to the court by way of supplement to said bill of complaint as follows:

1. On or about June 11, 1923, and before the service of a warning order upon the infant defendants Bayard Warren

Jr., Lily Warren and Camilla Warren, there was born to their mother another daughter, Caroline Sears Warren, whom your orator desires to and hereby does make a party defendant to said bill of complaint in her own right and as representing, jointly with her said brothers and sisters, the same persons and interests which said brother and sisters of hers, or some one or more of them, are alleged in said bill of complaint to represent; and your orator prays that said defendant
187 Caroline Sears Warren may be summoned and required to answer the bill of complaint herein according to law and the rules of this court.

2. The defendant Charlotte Gardiner Robertson, who was an infant when served with process in this cause, has passed the age of eighteen (18) years and is no longer an infant, and your orator prays that she may be required to answer its bill of complaint herein.

3. The defendant Chester Crandall Chapin, who was served with process in this cause on or about February 23, 1923, has since that time died, leaving no issue him surviving and being still an infant at the time of his death.

(Signed) FISHER, BOYDEN, KALES & BELL,
Solicitors for Plaintiff.

(Signed) WILLIAM W. CASE,
Of Counsel.

(Endorsed) Filed April 25, 1924, John H. R. Jamar, Clerk.

188 And on to-wit: on the 26th day of April A. D. 1924 there was filed in the Clerk's Office of said Court a certain Answer of Illinois Merchants Trust Company, as Trustees, to the Amended Bill of Complaint in words and figures following, to-wit:

189 • • • • • • •

Fr. 26. The Answer of Illinois Merchants Trust Company, as Trustee Under a Trust Deed from the Corporation of the Fine Arts Building Dated March 5, 1903 and Recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Document Number 3382697, in Book 8211 of Records, at Page 43; and Illinois Merchants Trust Company, as Trustee Under a Trust Deed from Chicago Auditorium Association Dated February 1, 1889 and Recorded in Said Recorder's Office as Document Number 1058261, in Book 2513 of Records, at Page 61; and Illinois Merchants Trust Company, as Trustee Under a Trust Deed from Chicago Auditorium Association Dated February 1, 1892 and Recorded in Said Recorder's Office as Document Number 1693161, in Book 3916 of Records, at Page 145, to the Amended Bill of Complaint in the Above Entitled Cause.

190 These defendants, reserving to themselves all rights of exception to said amended bill of complaint, for answer say:

I.

That these defendants admit that the complainant is a corporation organized substantially as stated in Paragraph I of its amended bill of complaint.

II.

That these defendants admit that the complainant acquired property substantially as is stated in Paragraph II of its amended bill of complaint.

III.

That these defendants admit that the complainant made the leases mentioned in said amended bill of complaint substantially as is alleged in said amended bill of complaint and acquired the leasehold estates mentioned in said amended bill of complaint substantially as is alleged in said amended bill of complaint and that the complainant made the supplemental agreements relating to said leases and leasehold

estates mentioned in said amended bill of complaint substantially as is alleged in said amended bill of complaint.

IV.

That these defendants admit that under date of March 5, 1903 The Corporation of the Fine Arts Building made, executed, acknowledge and delivered to Illinois Trust and 191 Savings Bank, as Trustee, the said trust deed recorded in the Recorder's office of Cook County, Illinois, as Document Number 3382697, to secure an issue of one thousand (1,000) bonds of the denomination of one thousand dollars ($1,000.) each, and these defendants allege that said The Corporation of the Fine Arts Building made, executed and delivered its said one thousand (1,000) bonds in the denomintaion of one thousand dollars ($1,000.) each, all bearing interest at the rate of four and one-half (4½) per cent per annum payable semi-annually and that one million dollars ($1,000,000.) of said bonds are outstanding and unpaid in the hands of innocent purchasers thereof for value before the maturity thereof; and these defendants allege that said trust deed Document Number 3382697 is a valid lien upon all the property in said trust deed described to secure the payment of said bonds and interest thereon; and these defendants allege that none of them represents the legal holders or owners of any of said bonds described in or secured by said last mentioned trust deed; and these defendants allege that the rights of the legal holders and owners of said bonds are seriously affected by the extraordinary proceedings proposed by the complainant in this cause and that they are necessary parties to this suit and that this Court cannot properly proceed with this cause until they are made defendants hereto and brought into this suit.

192 V.

That these defendants admit that under date of February 1, 1889 the complainant made, executed, acknowledged and delivered to Illinois Trust and Savings Bank, as Trustee, the said trust deed recorded in the Recorder's office of Cook County, Illinois, as Document Number 1058261, to secure an issue of bonds in the aggregate amount of nine hundred thousand dollars ($900,000.), and these defendants allege that the said complainant made, executed and delivered its said bonds

in the aggregate principal amount of nine hundred thousand dollars ($900,000.), all bearing interest at the rate of five (5%) per cent per annum payable semi-annually and that eight hundred thirty-four thousand dollars ($834,000.) principal of said bonds are outstanding and unpaid in the hands of innocent purchasers thereof for value before the maturity thereof; and these defendants allege that said trust deed Document Number 1058261 is a valid lien upon all the property in said trust deed described to secure the payment of said bonds and interest thereon; and these defendants allege that none of them represents the legal holders or owners of any of said bonds described in or secured by said last mentioned trust deed; and these defendants allege that the rights of the legal holders and owners of said bonds are seriously affected by the extraordinary proceedings proposed by the complainants in this cause and that they are necessary parties to this suit and that this Court cannot properly proceed with this cause until they are made defendants hereto and 193 brought into this suit.

VI.

That these defendants admit that under date of February 1, 1892 the complainant made, executed, acknowledged and delivered to Illinois Trust and Savings Bank, as Trustee, the said trust deed recorded in the Recorder's office of Cook County, Illinois, as Document Number 1693161, to secure an issue of bonds in the aggregate amount of one million six hundred thousand dollars ($1,600,000.) principal, and these defendants allege that the said complainants made, executed and delivered its said bonds only in the amount of seven hundred sixty-six thousand dollars ($766,000.) principal par value of said bonds, all bearing interest at the rate of five (5%) per cent per annum payable semi-annually and that five hundred forty-one thousand ($541,000.) principal par value of said bonds are outstanding and unpaid in the hands of innocent purchasers thereof for value before the maturity thereof; and these defendants allege that said trust deed Document Number 1693161 is a valid lien upon all the property in said trust deed described to secure the payment of said bonds and interest thereon; and these defendants allege that none of them represents the legal holders or owners of any of said bonds described in or secured by said last mentioned trust deed; and these defendants allege that

the rights of the legal holders and owners of said bonds are seriously affected by the extraordinary proceedings proposed by the complainants in this cause and that they are nec-
194 essary parties to this suit and that this Court cannot properly proceed with this cause until they are made defendants hereto and brought into this suit.

VII.

That these defendants do not know whether or not any of the parties mentioned in said amended bill of complaint as owners or holders of any of said bonds do in fact own or hold any of said bonds, nor do these defendants know whether or not any such persons are fairly representative of any class, nor whether or not their interests in this cause are substantially identical with the interests of any other owner or holder of any of said bonds; that said amended bill of complaint shows that the complainant proposes to demolish and take away all the buildings which originally constituted the security for the payment of said bonds; that all the legal holders and owners of said bonds are vitally interested in the proposed action of the complainant and are entitled to be heard in this Court with respect to the terms upon which the complainant shall be allowed, if at all, to take its proposed action; that none of the legal owners or holders of said bonds has delegated to any of these defendants any authority to represent them with respect to such proposed action of the complainant; that such action on the part of the complainant was not contemplated or provided for in the making of any of said trust deeds.

195 VIII.

That after the making of said trust deeds said Illinois Trust and Savings Bank consolidated with The Merchants' Loan and Trust Company under the name Illinois Merchants Trust Company and that Illinois Merchants Trust Company is now the Trustee in place of Illinois Trust and Savings Bank under each of said trust deeds respectively.

IX.

That there has been constructed upon the property covered by said trust deeds one entire building commonly known as

the Auditorium Building; that these defendants do not know what was the cost of said building nor how such cost was defrayed.

X.

That these defendants have no knowledge of the details of the construction of said building nor of its present condition nor of the details of the alleged changes in the character of the neighborhood in which said building stands nor as to the alleged enhancements of land values in that neighborhood nor as to the details of the alleged increases in taxes upon the said property nor as to the cost of operating and maintaining the said building nor as to the alleged profits or losses of the complaint from said property, and these defendants demand strict proof of all the allegations of said amended bill of complaint with respect to all said matters.

196

XI.

That these defendants do not know whether or not said leasehold interests and building constitute substantially all the assets of the complaint nor whether or not the complainant is longer able to pay the interest on its outstanding bonded indebtedness nor whether or not the complainant is in danger of losing its capital stock, property and assets nor whether or not the complainant is able to obtain any funds for the construction of any new building upon any of said property and these defendants demand strict proof of all the allegations of said amended bill of complaint with respect to all such matters.

XII.

That these defendants deny that the complainant is empowered or has the right to tear down or remove the present building or improvements from said property; on the contrary, these defendants allege that any tearing down or removal of the present building and improvements on said property would violate the terms, provisions and covenants of the leases and would violate the terms, provisions and covenants of said trust deds and each of them and would constitute waste.

XIII.

That these defendants deny that there is any cloud upon the title of the complainant to any of said property, for the removal of which or for the relief against him the complainant is entitled to the aid of this Court.

197 XIV.

That these defendants deny that the interests of the bondholders secured by the said trust deed dated March 5, 1903 and recorded as Document Number 3382697 are substantially the same as the interests of the owner of the fee of the Studebaker property; that, on the contrary, the interests of said bondholders are derived from said trust deeds and the bonds therein mentioned and that the security of said bondholders depends upon the continuance of the leasehold estate in said property and the maintenance on said property of buildings and improvements to produce an income for the payment of said bonds.

XV.

That these defendants do not know whether or not the bondholders secured by the trust deeds dated, respectively, February 1, 1889 and February 1, 1892 and recorded, respectively, as Document Number 1038261 and Document Number 1693161, are favorably disposed towards the complainant's plans, but these defendants allege that the interests of all of such bondholders are vitally affected by the proposal to demolish and take away the buildings which constitute the security for the payment of said bonds and that all legal holders and owners of said bonds should be brought into this proceeding and should be given an opportunity to be heard with respect to the proposed action to be taken in this proceeding.

198 XVI.

That these defendants deny each and every allegation of said amended bill of complaint not herein expressly admitted.

XVII.

That these defendants deny that the complainant is entitled to any such relief as is prayed for in its amended bill of complaint and these defendants allege that this Court should not proceed with this cause until all the owners and holders of all the bonds hereinbefore mentioned have been made parties to this proceeding and have been properly brought into this Court, and these defendants allege that this Court has no authority or jurisdiction to grant any such relief as is prayed for in said amended bill of complaint.

And now having fully answered the said amended bill of complaint, these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

ILLINOIS MERCHANTS TRUST COMPANY,
as Trustee under a trust deed from The Corporation of the Fine Arts Building, dated March 5, 1903 *and recorded in the office of the Recorder of Deeds of Cook County, Illinois, as Document Number* 3382697, *in Book* 8241 *of Records, at page* 43;

ILLINOIS MERCHANTS TRUST COMPANY,
as Trustee under a trust deed from Chicago Auditorium Association, dated February 1, 1889 *and recorded in said Recorder's office as Document Number* 1058261, *in Book* 2515 *of Records, at page* 61; *and*

199 ILLINOIS MERCHANTS TRUST COMPANY,
as Trustee under a trust deed from Chicago Auditorium Association, dated February 1, 1892 *and recorded in said Recorder's office as Document Number* 1693161, *in Book* 3916 *of Records, at page* 145,

By McCULLOCH, McCULLOCH & DUNBAR
Their Solicitors.

McCULLOCH, McCULLOCH & DUNBAR
Solicitors and of Counsel.

(Endorsed) Filed April 26, 1924, John H. R. Jamar, Clerk.

200 And on to-wit: the 22nd day of May A. D. 1924, there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit:

201 • • • • • • •

The Answer of the Defendants Caroline P. McCready, The Northern Trust Company, Trustee under the Last Will and Testament of Mary E. Shields, deceased, Edwin A. Seipp and The Northern Trust Company, as Trustee under the Last Will and Testament of Edward W. McCready, deceased, to the Bill of Complaint as Amended of Chicago Auditorium Association.

Answering said Bill of Complaint as amended, these defendants admit and state that they are, respectively, the owners of certain of the bonds secured by the first mortgage deed of trust described in said bill of complaint, being a deed of trust from said Chicago Auditorium Association to Illinois Trust and Savings Bank, now Illinois Merchants Trust Company, dated February 1, 1889, and recorded in the office of the Recorder of Cook County, Illinois, in Book 2515 of Records, at page 61, as Document Number 1058261. This defendant, Caroline P. McCready, is the owner of such bonds of the par value of Three Thousand Dollars ($3000); this defendant, The Northern Trust Company, as Trustee under the Last Will and Testament of Mary E. Shields, deceased, of such bonds of the par value of Fifteen Hundred Dollars ($1500); this defendant, Edwin A. Seipp, of such bonds of the par value of Fifteen Hundred Dollars ($1500); and this defendant, The Northern Trust Company, as Trustee
202 under the Last Will and Testament of Edward W. McCready, deceased, of such bonds of the par value of Three Thousand Dollars ($3000). These defendants admit that they are citizens of the State of Illinois, and that the question involved in this cause is one of common and general interest to all the bondholders secured by said trust deed; and they believe that, as alleged in said bill of complaint, they are fairly representative of the entire class of said bondholders, and their interests in said cause are substantially identical with the interests of all other members of said class, and they accordingly file this answer in their own right and as representatives of the legal holders and owners of all of the bonds secured by said deed of trust, recorded as Document Number 1058261.

These defendants admit that by said first mortgage deed of trust said Chicago Auditorium Association conveyed and assigned all of its leasehold interest in and to the real estate referred to in said bill of complaint as the Auditorium Property, to secure payment of six hundred (600) bonds of the par value of One Thousand Dollars ($1000) each, and six hundred (600) bonds of the par value of Five Hundred Dollars ($500) each, all dated February 1, 1889, and maturing February 1, 1929, of which the bonds so as aforesaid owned by these defendants are part and parcel; and they believe it to be true, as stated in said bill of complaint, that there are now outstanding and unpaid Eight Hundred and Thirty-four Thousand Dollars ($834,000) par value of said bonds; and they believe that, as alleged in said bill of complaint, the owners of said bonds are very numerous, but these defendants are ignorant with respect to the ownership of the greater part of said bonds.

As to most of the allegations of said bill of complaint,
203 these defendants have no knowledge; but they admit that the building on said Auditorium property is obsolete and ought to be replaced by modern improvements; and they consent to the entry of a decree in accordance with the prayer of said bill as amended on condition that no such decree shall displace or disturb the lien of said bondholders, and that in and by any such decree the plaintiff shall be required to furnish adequate security to be approved by the Court for the erection of an adequate new building on the premises before the present building is pulled down.

These defendants pray that this their answer may be taken as that of the entire class represented by them as aforesaid, and they submit their rights, and the rights of the other bondholders who are members of said class, to the tender consideration of the Court.

CAROLINE P. McCREADY,
THE NORTHERN TRUST COMPANY,
as Trustee under the last will of
Mary E. Shields, Deceased,
EDWIN A. SEIPP,
THE NORTHERN TRUST COMPANY,
as Trustee under the last will of
Edward W. McCready, Deceased.
By ELTING & JUDSON,
Their Solicitor.

ELTING & JUDSON
Solicitor for said Defendants.

(Endorsed) Filed May 22, 1924, John H. R. Jamar, Clerk.

204 And on to-wit: the 22nd day of May A. D. 1924 there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit: Filed May 22, 1924.

205 * * * * * *

Filed May 22/24.

The Answer of the Defendants Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp and The Northern Trust Company, Trustee under the Last Will and Testament of Adele C. Stone, deceased, to the Bill of Complaint as Amended of Chicago Auditorium Association.

Answering said Bill of Complaint as Amended, these defendants admit and state that they are, respectively, the owners of certain of the bonds secured by the second mortgage deed of trust described in said bill of complaint, being a deed of trust from said Chicago Auditorium Association to Illinois Trust and Savings Bank, now Illinois Merchants Trust Company, dated February 1, 1892, and recorded in the office of the Recorder of Cook County, Illinois, in Book 3916 of Records, at page 145, as Document Number 1693161. This defendant, Charles S. Dewey, is the owner of such bonds of the par value of Six Thousand Dollars ($6000); each of these defendants, Edwin A. Seipp, William C. Seipp and Clarence T. Seipp, of such bonds of the par value of Three Thousand Dollars ($3000); and this defendant, The Northern Trust Company, as Trustee under the Last Will and Testament of Adele C. Stone, deceased, of such bonds of the par value of Five Thousand Dollars ($5000). These
206 defendants admit that they are citizens of the State of Illinois, and that the question involved in this cause is one of common and general interest to all the bondholders secured by said trust deed; and they believe that, as alleged in said bill of complaint, they are fairly representative of the entire class of said bondholders, and their interests in said cause are substantially identical with the interests of all other members of said class, and they accordingly file this answer in their own right and as representatives of the legal holders and owners of all of the bonds secured by said deed of trust, recorded as Document Number 1693161.

These defendants admit that by said first mortgage deed

of trust said Chicago Auditorium Association conveyed and assigned all of its leasehold interest in and to the real estate referred to in said bill of complaint as the Auditorium Property, to secure payment of a large number of its consolidated mortgage bonds of the par value of One Thousand Dollars ($1000) each, all dated February 1, 1892, and maturing February 1, 1942, of which the bonds so as aforesaid owned by these defendants are part and parcel; and they believe it to be true, as stated in said bill of complaint, that there are now outstanding and unpaid Five Hundred and Forty-one Thousand Dollars ($541,000) par value of said consolidated mortgage bonds; and they believe that, as alleged in said bill of complaint, the owners of said bonds are very numerous, but these defendants are ignorant with respect to the ownership of the greater part of said bonds.

As to most of the allegations of said bill of complaint, these defendants have no knowledge; but they admit that the building on said Auditorium Property is obsolete and ought to be replaced by modern improvements; and they consent to the entry of a decree in accordance with the prayer of said bill as amended, on condition that no such decree
207 shall displace or disturb the lien of said bondholders, and that in and by any such decree the plaintiff shall be required to furnish adequate security to be approved by the Court for the erection of an adequate new building on the premises before the present building is pulled down.

These defendants pray that this their answer may be taken as that of the entire class represented by them as aforesaid, and they submit their rights, and the rights of the other bondholders who are members of said class, to the tender consideration of the Court.

CHARLES S. DEWEY,
EDWIN A. SEIPP,
WILLIAM S. SEIPP,
CLARENCE T. SEIPP,
THE NORTHERN TRUST COMPANY,
as Trustee under the Last Will of Adele C. Stone, Deceased,
By ELTING & JUDSON,
Their Solicitor.

ELTING & JUDSON
Solicitor for said Defendants.

(Endorsed) Filed May 22, 1924, John H. R. Jamar, Clerk.

208 And on to-wit: the 29th day of May A. D. 1924, there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit: Filed M 1924.

209 * * * * * *

Filed May 29, 1924.

ANSWER OF ALBERT W. HARRIS, FIRST TRUST AND SAVINGS BANK, A CORPORATION, GEORGE HIGGINSON, JUNIOR, AND COLUMBUS HEALY, DEFENDANTS, TO THE BILL OF COMPLAINT AND AMENDMENTS THERETO OF CHICAGO AUDITORIUM ASSOCIATION.

These defendants reserving to themselves all right of exception to the said Bill of Complaint and the Amendments thereto, for answer thereto say that they are, in the amounts following their respective names as below set forth, the holders and owners of certain of the bonds described in and secured by the Trust Deed from The Corporation of the Fine Arts Building, a corporation of the State of Illinois, to Illinois Trust and Savings Bank, a corporation of the State of Illinois, as Trustee, dated March 5, 1903, and recorded in the Office of the Recorder of Cook County, Illinois, April 28, 1903, in Book 8241 of Records, at page 43, as Document No. 3382697, given to secure one thousand (1,000) bonds of said The Corporation of the Fine Arts Building in the denomination of One thousand (1,000) dollars each, aggregating One million (1,000,000) dollars par value, all bearing interest at the rate of four and one-half per
210 cent (4½%) per annum from March 1, 1903, payable semi-annually and due serially on various dates up to and including March 1, 1903: Albert W. Harris Five thousand (5,000) dollars par value; First Trust and Savings Bank Three hundred thirty-nine thousand (339,000) dollars par value; George Higginson, Junior, One thousand (1,000) dollars par value; Columbus Healy One thousand (1,000) dollars par value.

That more than Six hundred (600) of said bonds have not yet matured by their terms, as set forth in said Trust Deed, and these defendants believe it to be a fact as alleged in

the Amendments to said Bill of Complaint that at least Six hundred (600) of said bonds are still outstanding and unpaid; and that aside from the bonds owned and held by them as above set forth the holders and owners of the remaining unpaid and outstanding bonds secured by said Trust Deed are unknown to these defendants, but these defendants aver that they are fairly representative of said entire class of holders and owners of said bonds and that their interests in this cause are substantially identical with the interests of all other members of said class of bondholders and these defendants, therefore, make this answer not only on their own behalf but as representatives of all the members of said class.

These defendants further answering admit the following:

That the complainant was duly incorporated and organized as alleged in paragraph 1 of said Bill of Complaint.

That it erected the building and auditorium as described in paragraph 2 of said Bill.

That the leases set forth in paragraph 5 of said Bill of Complaint were executed and delivered as therein alleged.

That on or about March 5, 1903, the Corporation of the Fine Arts Building, a corporation of the State of Illinois, having acquired and then owning the title in fee simple
211 to the property referred to in said bill as the Studebaker property, conveyed it with other property to the Illinois Trust and Savings Bank, a corporation of the State of Illinois, as Trustee, by a certain Trust Deed dated March 5, 1903, and recorded in the office of the Recorder of Cook County, Illinois, April 28, 1903, in Book 8341 of Records, at page 43, as Document No. 3382697, to secure One thousand (1,000) bonds of said The Corporation of the Fine Arts Building in the denomination of One thousand (1,000) dollars each, all bearing interest at the rate of four and one-half per cent. (4½%) per annum from March 1, 1903, payable semi-annually and due serially on various dates up to and including March 1, 1933, as alleged in paragraph 8 of said Bill of Complaint.

That on or about December 1, 1889, the complainant erected the building now situated on the property described in said Bill of Complaint and commonly known as the "Auditorium Building," and that none of those parts of said building which are located upon the respective tracts of ground demised by the several leases mentioned in said Bill are separable from the entire building taken as a whole.

And these defendants further answering say that they do not know and have never been informed, save by the complainant's Bill and the Amendments thereto, and cannot form any belief concerning the other matters set forth in said Bill and the Amendments thereto, and as to such matters call for strict proof thereof.

These defendants further answering say that should the court grant the prayer of said complainant and permit it to tear down and remove any and all buildings which may for the time being be upon the premises described in said Bill of Complaint the court should require the complainant to give full and adequate security to the Illinois Merchants Trust Company, an Illinois corporation, successor to the Illinois Trust and Savings Bank, as Trustee under the Trust Deed above described, to afford said Trustee and the
212 holders and owners of the bonds secured by said Trust Deed, including these defendants, adequate protection until a new and more valuable building shall have been erected and completed upon said premises.

And these defendants having thus answered said Bill of Complaint and the amendments thereto pray to be dismissed with their reasonable costs and charges in this behalf sustained.

ALBERT W. HARRIS,
FIRST TRUST & SAVINGS BANK,
GEORGE HIGGINSON, JUNIOR,
COLUMBUS HEALY,
By GEORGE W. GORDON,
As Their Solicitor.

GEORGE W. GORDON
Solicitor for said Defendants.

(Endorsed) Filed May 29, 1924, John H. R. Jamar, Clerk.

213 And on to-wit: the 2nd day of June A. D. 1924, the following proceedings were had and entered of record in said court, as follows, to-wit:

June 2. 214 • • • • • • •

Monday, June 2, 1924.

Present: Hon. James H. Wilkerson, Judge of Said Court.

On motion of the solicitors for the complainant that a guardian ad litem be appointed for the infant defendants, John Fox Slater, Elena de Struve, Boris de Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Camilla Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman;

It is hereby ordered that Roswell B. Mason, Esquire, be appointed guardian ad litem for the above named infant defendants, and be directed to file his answer as such guardian ad litem within twenty (20) days.

JAMES H. WILKERSON,
Judge of said Court.

Approved
FISHER, BOYDEN, KALES & BELL,
Solicitors for pltff.
June 2, 1924.

ne 3. 215 And on to-wit: the 3rd day of June A. D. 1924 there was filed in the Clerk's Office of said Court a certain Answer in Words and Figures Following, to-wit:

216 • • • • • • •

Filed June 3, 1924.

Answer of the Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr. by Louis M. Greeley, Their Guardian Ad Litem to the Bill of Complaint of The Chicago Auditorium Association, Complainant as Amended.

These defendants answering by their said Guardian ad Litem, Louis M. Greeley say that they are infants under legal age and that they therefore submit their rights and interests in the matter in question in this cause to the tender

consideration and protection of this Honorable Court and pray strict proof of the matters alleged in said bill of complaint.

MARGARET WILLING,
EVELYN PIERREPONT WILLING,
MARK SKINNER WILLING, JR.,
By LOUIS M. GREELEY,
Their Guardian ad Litem.

LOUIS M. GREELEY
Solicitor and of Counsel.

(Endorsed) Filed June 3, 1924, John H. R. Jamar, Clerk.

217 And on to-wit: on the 10th day of June A. D. 1924, the following proceedings were had and entered of record in said Court in words and figures following, to-wit: Entered 10, 192

218 • • • • • •

Tuesday, June 10, 1924.

Present: Hon. James H. Wilkerson, Judge of Said Court.

On motion of defendant's attorney It Is Ordered that leave be and the same is hereby given defendants to substitute The Northern Trust Company as Trustee under the last Will and Testament of Henry J. Willing, deceased, as party defendant herein in lieu of Ambrose Cramer as such Trustee.

219 And on to-wit: the 10th day of June A. D. 1924, there was filed in the Clerk's Office of said Court a certain Joint and Several Answer of The Northern Trust Company et al, in words and figures following, to-wit:

221 * * * * * *

June 10. THE JOINT AND SEVERAL ANSWER OF THE NORTHERN TRUST COMPANY AND MARK SKINNER WILLING AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF HENRY J. WILLING, DECEASED, AND OF MARK SKINNER WILLING, INDIVIDUALLY, TO THE BILL OF COMPLAINT AS HERETOFORE AMENDED AND SUPPLEMENTED.

To the Honorable Judge of the above entitled Court sitting in Chancery:

The joint and several answer of The Northern Trust Company and Mark Skinner Willing as Trustees Under The
222 Last Will and Testament of Henry J. Willing, Deceased, and of Mark Skinner Willing, Individually, by Samuel Topliff, Esq., and Homer H. Cooper, Esq., their solicitors, respectfully shows:

First. These defendants admit that in, to wit, the year 1886, certain persons of the City of Chicago, State of Illinois, purported to organize a corporation by the name "Chicago Grand Auditorium Association" under and pursuant to an act of the General Assembly of the State of Illinois approved April 18, 1872, entitled "An Act Concerning Corporations," as amended, and that a document purporting to be a certificate of incorporation was filed and recorded as alleged in paragraph 1. These defendants further admit that the records in the office of the Recorder of Cook County, Illinois, show purported original capital stock authorization, the purpose for which the alleged corporation was said to have been formed, its change of name to "Chicago Auditorium Association," purported increase of capital stock, and a purported amendment changing the purpose and objects of the alleged corporation as set forth in said paragraph 1. These defendants are without knowledge concerning the purported issuance of alleged capital stock or of the amount thereof.

These defendants say that the one and only purpose and object of the purported organization of said alleged corporation was the acquiring and holding of long-term leasehold interests in real estate and the construction and operation

of a building or buildings thereon to be operated with profit to the organizers; that the statutes of the State of Illinois then in force and effect and under which said persons attempted to create and continue the pretended plaintiff corporation did not authorize the creation or existence of a corporation for said purposes and objects, and that the
223 plaintiff never has had any existence as a lawful corporation.

These defendants say that even if "Chicago Grand Auditorium Association" or "Chicago Auditorium Association" exists or ever existed, it was and is and always has been without and devoid of lawful authority or power to accept or to hold the leasehold interests claimed by it as set forth in the original bill of complaint as amended. These defendants say that all of the acts or purported acts of "Chicago Grand Auditorium Association" and of "Chicago Auditorium Association" as the purported lessee of the real estate embraced in parcel 1 mentioned in the original bill of complaint and now owned by these defendants are wholly void and of no legal effect, and that the purported so-called Walker leases are and always have been nullities.

Second. These defendants admit the erection of the building known as The Chicago Auditorium Building upon the real estate described in paragraph 2, but these defendants deny that the entry of the plaintiff upon said real estate or the erection of said building was the lawful exercise of any existing valid corporate power by the plaintiff or the conduct of any authorized corporate business; and these defendants say that said purported leases were acquired or attempted to be acquired, and said building constructed, solely as an investment for profit, and that said purported leases were null and void.

Third. These defendants admit the making, execution and delivery of two instruments purporting to be leases, designated as the Walker leases, dated January 17, 1887, copies of which are made part of the original bill of complaint as Exhibits 2 and 4, and of the documents purporting to be supplemental agreements to said purported leases, designated as the Willing agreements, dated July 9, 1891,
224 copies of which are likewise made part of the original bill of complaint as Exhibits 3 and 5.

These defendants deny that any or all of said four instruments is or are valid and enforcible, and say that they and

each of them are void and of no effect as leases or as supplements thereto.

Fourth. These defendants are without knowledge as to the matters and things alleged in paragraph 4 relating to the making, execution and delivery of other instruments being or purporting to be a lease and agreement with respect to parcel 2.

Fifth. These defendants are without knowledge as to the matters and things alleged in paragraph 5 relating to the making, execution and delivery of other instruments being or purporting to be a lease and agreement with respect to parcel 3.

Sixth. These defendants admit the allegations contained in paragraph 6 to the effect that the title in fee simple to the original Walker property, designated as parcel 1, by mesne conveyances was vested in certain undivided fractional parts in Ambrose Cramer and Mark Skinner Willing as Trustees Under the Last Will and Testament of Henry J. Willing, Deceased, and in Mark Skinner Willing in his personal right at the time of the filing of the original bill of complaint. However, since the filing of said original bill of complaint, said Ambrose Cramer has tendered his resignation as one of the trustees under the last will and testament of Henry J. Willing, deceased, which resignation has been duly accepted in a proceeding heretofore had in the Superior Court of Cook County, State of Illinois, and The Northern Trust Company, one of these answering defendants, has been duly appointed and qualified in the place and stead of said Ambrose Cramer as shown by a decree entered on the 7th day of June, A. D. 1924, in the said Superior
225 Court of Cook County. Wherefore, the title in fee simple to said parcel 1 now is vested in certain undivided fractional parts in The Northern Trust Company and Mark Skinner Willing as Trustees Under the Last Will and Testament of Henry J. Willing, Deceased, and in Mark Skinner Willing, Individually. Title to so much thereof as is indicated by a fraction of which the numerator is Three Hundred Ninety-eight Thousand One Hundred Fifty-two and Thirty-nine One-hundredths, and of which the denominator is One Million, being in figures as follows: $\frac{398,152.39}{1,000,000}$, is vested in said trustees, and all the rest in Mark Skinner Willing in his personal right.

Seventh. These defendants are without knowledge as to the matters and things alleged in paragraph 7 concerning the title of parcel 2.

Eighth. These defendants are without knowledge as to the matters and things alleged in paragraph 8 and in the amendments and supplements thereto relating to parcel 3.

Ninth. These defendants are without knowledge as to the matters and things alleged in paragraph 9 and in the amendments and supplements thereto relating to the making, execution and existence and recordation of purported encumbrances on the plaintiff's alleged leasehold interests.

These defendants say that if said purported encumbrances were made and exist, and if said purported bonds were issued, as alleged in paragraph 9, the same are not valid and are of no force or effect as liens upon parcel 1 owned by these defendants, for the reason that the plaintiff never has had any valid leasehold interest in said real estate.

226 Tenth. These defendants admit that early in the year 1887 the plaintiff took possession of the parcels or tracts of land described in the five instruments designated as leases in the original bill of complaint. Defendants further admit that said tracts were connected and form one general tract. These defendants further admit that the plaintiff at once, with the knowledge and consent, but not with the procuration, of the person or persons designated therein as lessors, proceeded to erect thereon one entire building, commonly known as The Auditorium Building, which was completed on or about December 1, 1889, at a cost, as these defendants believe, of over Three Million Dollars ($3,000,000). But these defendants are without knowledge as to how said cost was defrayed.

These defendants further admit the substance of the allegations of paragraph 10 to the effect that none of those parts of The Auditorium Building located upon the separate parcels of land is separable from the entire building taken as a whole; that at the time of the execution of the documents purporting to be leases, all of which appear to be substantially identical in their conditions and general provisions, it was contemplated and intended that a single building, not separable into parts apportionable to separate purported leaseholds, should be erected upon and completely cover the entire Auditorium property; that the present building was constructed in accordance with such intention, and that it could not be dismembered without heavy expense and

loss; that these conditions of unity have existed continuously ever since erection of said Auditorium Building, and that all subsequent purchasers of said property or any part thereof or other owners of said real estate or any part thereof have acquired their respective interests therein with full knowledge of said existing conditions and of the character
of said building as a single indivisible unit covering the
227 entire property; and that it was after completion of said
indivisible building and with full knowledge of its character aforesaid that the parties executed certain purported extensions of purported leases for an additional term of years mentioned in paragraph 3.

Wherefore, these defendants say that the controversy in this suit between the plaintiff as pretended lessee on the one side and all of the defendants as pretended lessors on the other side is one and the same controversy, and is not separable, and is not different or distinct in substance between or among all of the defendants; that there is not any controversy between the plaintiff and defendants who are not citizens of Illinois, which is wholly between citizens of different states and which can be fully determined as between them, but that on the contrary the controversy could not be determined as between the plaintiff and any defendants not citizens of Illinois without the presence of defendants who are citizens of Illinois; and that for want of any separable controversy with respect to defendants not citizens of Illinois, this cause ought not to have been removed from the Circuit Court of Cook County of the State of Illinois to this above entitled court, and that this federal court is without jurisdiction to decide the issues presented for adjudication.

Eleventh. These defendants are without knowledge as to the details of construction of The Auditorium Building as the same are alleged in paragraph 11.

Twelfth. These defendants are without knowledge as to the matters and things alleged in paragraph 12 concerning the nature or extent of occupancy and use of the premises near The Auditorium Building in or about the year 1886.

However, these defendants do not admit, and they hereby
deny, that a change in the neighborhood such as is al-
228 leged by the plaintiff has any bearing upon or consti-
tutes any ground for relief in chancery. Furthermore, if at any time it becomes or appears to become material, these defendants say and will contend that the changes in

said neighborhood have been wholly to the gain and advantage of the plaintiff in the conduct and operation of its enterprise, and that the probability of such changes was considered by the plaintiff before and when the purported leases were made.

Thirteenth. These defendants admit a steady enhancement in the value of the lands described in the purported leases and admit in substance the computations in figures set forth in paragraph 13, except those computations with respect to purported leases other than the two so-called Walker leases. However, by these admissions, these defendants do not admit, and they hereby deny, that any allegation of said paragraph 13 has any bearing upon or constitutes any ground for relief in chancery.

Fourteenth. These defendants are without knowledge as to the matters and things alleged in paragraph 14 touching and concerning the valuations by the Board of Review of Cook County, State of Illinois. These defendants admit the valuations mentioned in paragraph 14 as valuations for taxation purposes are less than the present actual valuations of both land and building. However, by these admissions these defendants do not admit and they hereby deny that any allegation of said paragraph 14 has any bearing upon or constitutes any ground for relief in chancery.

Furthermore, if at any time it becomes or appears to become material, these defendants say and will contend that the proposed erection of a new and costly building on the land, if permitted, inevitably must increase the amount of taxes annually chargeable upon the land and the building,

229 and that, therefore, the existence of the proposed new and costly building, if permitted, annually will add a heavy and severe burden upon the lands owned by these defendants, which burden was not contemplated in the formation of the purported leases and purported supplements thereto and would be a violation of the provisions thereof if they were valid leases.

Fifteenth. These defendants deny the allegation of paragraph 15 that at the present time the rental value of property similar in character and location to the Auditorium property generally is reckoned at five per cent (5%) per annum of the value of the fee. These defendants say that the method of estimating the rental value of property on the basis of an annual percentage of the value of the fee is only applied and is only applicable where the property

is vacant or where a lessee has or is to be given the right to remove existing buildings and improvements and to construct upon the premises such other improvements, permitted by law, as will produce the maximum of income from the property, and that said method of estimating rental value is wholly inapplicable to the purported leasehold interests in parcel 1; that even if the purported leases are valid, under the provisions thereof plaintiff is required to maintain throughout the entire demised term of said leases the present building, and that the rental value of said present leaseholds, if they be valid, is limited to such return or income as may be obtained from the premises with the present building maintained thereon throughout the term.

Wherefore, these defendants say that the computation of alleged annual rental values of the fee as set forth in paragraph 15 is wholly immaterial because made on an erroneous and inadmissible theory, and because of irrelevance to any relief in chancery.

These defendants admit the allegations of paragraph
230 15 to the effect that the rental value of said Auditorium property, unencumbered and unimproved, taken as a unit for building purposes, is substantially greater than the aggregate rental value of said properties taken separately.

However, neither by these admissions nor these denials do these defendants concede, and they hereby deny, that any allegation of said paragraph 15 has any bearing upon or constitutes any ground for relief in chancery.

Sixteenth. These defendants deny that in order to meet the modern demands of cost of operation, building equipment and service, revenue is required to an extent greatly in excess of any that can possibly be realized from the existing building, either in its present condition or in any condition to which the present structure can be brought. They deny that such revenue can be realized only from a building of greatly increased height, which provide the maximum obtainable number of floors, with the maximum amount of floor space, having a modern steel-skeleton structure, supported on caisson foundations, carried to the maximum height now allowed by law. They deny that the only means whereby an adequate increase in revenue commensurate with the value of said leasehold interests can be derived from said property is through the construction of a new building thereon.

These defendants admit that the present building is thirty-

five years old, but they deny that it is obsolete or uneconomical for the reasons alleged in the bill of complaint or for any reason. As to allegations of settlement under the walls, distortion, fractures, cracks and the like, these defendants say and will contend that if each and all said allegations be true, nevertheless the same has been caused by the neglect of the plaintiff and can be wholly and readily overcome by repairs to the existing building, and that if said
231 purported leases be valid, as plaintiff contends, it was and now is the duty of the plaintiff, by virtue of the covenants in said purported leases, to make good and repair such distortions and damages at its own proper costs and expense.

These defendants say that if the so-called Walker leases with their purported supplements be valid, as the plaintiff claims, then that by said purported leases the plaintiff covenanted and agreed to build and to have completed on said premises before August 1, 1889, a substantial and solid fireproof building of brick, stone, iron, steel and tile and such other materials as were necessary and usual then in fireproof buildings in the City of Chicago; to be in all respects in accordance with building ordinances of said city; to conform during the term of the purported leases to all municipal ordinances and laws; and at all times during said purported term, at its own proper costs and charges, to keep said building situated on said premises and all appurtenances belonging thereto in good repair and in a safe and secure condition, and all rooms in said building in a good, safe, clean and tenantable condition and repair. The existing building is the only building erected or authorized by the purported leases, and pursuant thereto, so plaintiff claims, it was built and completed by the plaintiff within the time limited. If, then, as alleged by plaintiff, there be defects in the original construction, the fault was and is the fault of the plaintiff. Both by the limitations of the purported leases and by laches the plaintiff now is barred from complaint thereat and reliance thereon for any relief in chancery.

These defendants say and always contend that if it be a fact, as alleged, that the cost of repairs be exceedingly great and even beyond the ability of the plaintiff, nevertheless the obligation to repair and maintain as con-
232 tained in the purported Walker leases is valid and enforcible if the leases themselves are valid and enforcible, and that neither alleged prohibitive cost nor alleged lack

of so-called commensurate return from its investment has any bearing upon or constitutes any ground for relief in chancery.

These defendants deny that the present building, if retained on the property, will continue to deteriorate if the plaintiff puts and keeps said building in good repair and in a safe and secure condition.

These defendants are without knowledge as to the value of the building taken separately and apart from the ground.

Neither by the admissions nor the denials of any of the matters and things mentioned in this paragraph Sixteenth do these defendants concede, and they hereby deny, that the allegations of paragraph 16 of the original bill of complaint have any bearing upon or constitute any ground for relief in chancery.

Seventeenth. These defendants are without knowledge as to any of the matters and things alleged in paragraph 17. Moreover, these defendants deny that any allegation of paragraph 17 has any bearing upon or constitutes any ground for relief in chancery.

Eighteenth. These defendants are without knowledge as to any of the matters and things alleged in paragraph 18. Moveover, these defendants deny that any allegation of paragraph 18 has any bearing upon or constitutes any ground for relief in chancery.

Nineteenth. These defendants are without knowledge concerning any of the matters and things alleged in paragraph 19. Moreover, these defendants deny that any allegation of paragraph 19 has any bearing upon or constitutes any ground for relief in chancery.

233 Twentieth. These defendants are without knowledge, except the allegations of paragraph 20 as amended, as to what plans the plaintiff has under consideration and what it is prepared to undertake.

These defendants deny that under the proper construction and interpretation of the terms, provisions and conditions of the several purported leases, if the same be valid, the plaintiff is empowered and has the right to tear down and remove the present improvements as a part of and incidental to the erection of a new improvement of purported equal or purported greater value, not impairing in any way the security and property rights of the defendants, upon furnishing alleged proper and alleged adequate security during the removal of the present improvement and until the

completion of the proposed new improvement. These defendants say that under the terms, covenants and provisions of the said so-called Walker leases and of the other purported leases under which plaintiff claims, if the same be valid as leases, the plaintiff is prohibited from removing the present improvement; that, if they be valid, on the contrary the plaintiff thereby is required to maintain the existing improvement throughout the entire ter mof the purported leases (including the extensions thereof) in good repair and in a safe and secure condition; and that said purported leases, if valid, do not, nor does any of them, permit the plaintiff to remove or tear down the present improvement, or any part thereof, whether as incidental to the erection of a new improvement, or otherwise, or upon furnishing alleged security or without furnishing any security, or otherwise.

These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants and conditions of the leases, if they be valid as leases, even though such removal be inci-
234 dental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while the old improvement is being wrecked and removed and before the new improvement is completed.

These defendants are without knowledge as to the allegations concerning persons with whom the plaintiff says it has to deal in the financing of its plans, and as to the alleged fears of such persons, if any.

These defendants admit they claim that, under the terms, covenants and conditions of the so-called Walker leases, if a destruction of the present improvement is made or is attempted, even though that destruction be incidental to and a part of the act of erecting a purported new and purported better improvement on the same property, after alleged adequate security shall have been given, it will constitute waste and be a ground of forfeiture of the leases, if they be valid as leases.

These defendants deny that the aforesaid claims, fears and uncertainties respecting the rights of the plaintiff, based, as alleged, upon the terms, covenants and conditions of the purported leases to said property, have greatly impaired the value of the alleged leasehold interests of the plaintiff,

or have made them unmarketable, or have prevented plaintiff from exercising any rights with respect thereto.

There defendants deny that the terms, covenants and conditions of the purported leases, in so far as they give color to the alleged claims, fears and uncertainties alleged in paragraph 20, or otherwise are clouds upon the title of the plaintiff.

These defendants deny that the plaintiff has any title to be clouded.

235 These defendants admit they have refused to give consent to the replacement of the present building by a new improvement as desired by the plaintiff.

These defendants deny that they or any one of them or anyone authorized in their behalf ever have prevented the plaintiff from exercising any lawful rights with respect to its alleged leasehold or ever have threatened to take any action of any kind by way of forfeiture or otherwise either in or out of any court against the plaintiff because of acts or proposed acts of the plaintiff as alleged lessee of the property of these defendants.

These defendants deny that they have ever done or caused to be done any act that in any way is or can be a cloud upon the alleged title of the plaintiffs. These defendants say that even if the so-called Walker leases be valid, nevertheless the proposed new and different building the plaintiff desires and prays the court it may be allowed to place upon the land places far greater burdens, duties and obligations upon the land and upon these defendants than are placed upon it and upon them under and by virtue of the purported leases, and these defendants say that they are entitled to decline to consent to such increased burdens.

Twenty-First. These defendants admit that the question whether the plaintiff has the right to remove the building now on said Auditorium property and to replace it with another building, and, if so, upon what terms and conditions, if any, is a question which, as between the plaintiff and the defendants owning or being interested in the fee of said property, presents a common issue of law and of fact substantially identical with respect to the interests of the several defendants.

These defendants are without knowledge as to the alleged rights of the alleged bondholders and of the other persons
236 mentioned in paragraph 21 as the same is amended.

Twenty-Second. These defendants admit that the several so-called ground leases contain provisions as to an appraisal

and purchase as alleged in paragraph 22. These defendants deny that the offer of the plaintiff with respect to waiver of such provisions has any bearing upon or constitutes any ground for relief in chancery. These defendants deny that this court or any court has power or jurisdiction to determine that the defendants as lessors, if the purported leases be valid, must accept any security whatsoever in the place and stead of the security therein expressly provided therefor. These defendants say it is impossible for this court, or any court, to specify any security or securities which will be or can be equal to the security provided in said purported leases and that any change of security whatsoever will deprive the defendants of property rights protected by constitutional safeguards and beyond the power of courts to take away.

Twenty-Third. These defendants say plaintiff has no standing in this court, or in any court, federal or state, sitting in Illinois, for the reasons that defendants have not committed or threatened to commit any act which is a delict or wrong against the plaintiff; that no legal controversy between the parties has arisen, and that all plaintiff seeks to obtain by this lawsuit is a declaratory finding or decre purporting to define the law of waste, to construe or interpret its alleged leases, if any, and to obtain apparent judicial sanction for a proposed indefinite future course of action—all of which is beyond the jurisdiction of the courts.

Twenty-Fourth. These defendants say plaintiff has an adequate and complete remedy at law.

237 Twenty-Fifth. These defendants say that by laches and delay the plaintiff is estopped and barred from instituting and from prosecuting any suit against these answering defendants upon any of the matters set forth in the bill of complaint as amended and supplemented.

Twenty-Sixth. These defendants say that they have valuable property rights in parcel 1, and, if the so-called Walker leases be valid as plaintiff asserts, that they have valuable property rights under the terms and provisions of said leases; that if the relief or any part thereof sought by the plaintiff herein be granted the defendants will be deprived of said rights and said property without due process of law and without compensation and in contravention of the constitutions of the United States and of the State of Illinois.

Twenty-Seventh. As to so much of the separate defense set forth in this answer by which these defendants aver that the so-called Walker leases are void and of no effect, these defend-

ants further say that, while they are under no obligation to do so, they are ready, able and willing to pay to the plaintiff herein, or to such person or persons as may be entitled to receive the same, the fair value of all buildings and improvements on parcel 1, and the defendants now offer to pay to the plaintiff, or to such person or persons, the actual cash value of the buildings and improvements on parcel 1.

Twenty-Eighth. These defendants deny that plaintiff is entitled to any relief whatsoever or to any part of the relief demanded in the original bill of complaint as amended and supplemented, both upon the merits of the plaintiff's alleged cause of action, and for the reason that the court lacks jurisdiction over parties and subject matter.

The defendants, in accordance with the opinion of court
238 heretofore rendered, reserve and pray the same benefit and advantage in this, their answer, as if they now again moved to dismiss said original bill of complaint as amended and supplemented.

These defendants deny all and all manner of unlawful acts whatsoever whereof they are in any wise charged: all of which matter and things these defendants are ready and willing to prove as this Honorable Court shall direct, and they pray to be hence dismissed with their reasonable costs and charges in this behalf, including costs, charges and attorneys' fees incurred by these defendants in enforcing the covenants and agreements of said leases in this proceeding, if they be found valid as leases.

THE NORTHERN TRUST COMPANY,
MARK SKINNER WILLING,
As Trustees Under The Last Will and Testament of Henry J. Willing, Deceased.

MARK SKINNER WILLING,
Defendants.
By SAMUEL TOPLIFF,
HOMER H. COOPER,
Their Solicitors.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Said Defendants.

Endorsed: Filed June 10, 1924, John H. R. Jamar, Clerk.

239 And on to wit: the 14th day of June A. D. 1924, there Filed Jt 1924.
was filed in the Clerk's Office of said Court a certain Answer of Defendants, William A. Slater, et al. in words and figures following to wit:

241 • • • • • •

THE ANSWER OF DEFENDANTS, WILLIAM A. SLATER, CHARLES L. HARRISON AND HALSEY MALONE, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF WILLIAM A. SLATER, DECEASED, WILLIAM A. SLATER, INDIVIDUALLY, ELLEN B. SLATER, ELEANOR MALONE, ELIZABETH SEARS WARREN, PHYLLIS SEARS TUCKERMAN, AND BAYARD WARREN AND BAYARD TUCKERMAN, JR., AS TRUSTEES, TO THE BILL OF COMPLAINT HEREIN AS AMENDED OF CHICAGO AUDITORIUM ASSOCIATION.

These defendants saving all right of exception and objection to the said bill of complaint as amended and every part thereof, for answer thereto say:

1. These defendants admit the facts stated in Paragraph 1 of said bill, except that they deny that plaintiff is a corporation duly organized under the Statutes of Illinois therein mentioned or otherwise and except that they are without knowledge as to the number of shares of stock of plaintiff issued and outstanding or whether such stock, or any part thereof is fully paid and nonassessable.

242 2. These defendants deny that plaintiff immediately after its alleged incorporation in the year 1886 proceeded to exercise those of its alleged powers mentioned in Paragraph 2 of said bill, but admit that thereafter plaintiff erected the building mentioned in said bill on the real estate described in said Paragraph 2 of said bill, but deny that said building was erected under any of the alleged powers of plaintiff, except the one set out in Paragraph 1 of said bill, as follows:

"To construct and maintain in the City of Chicago a building or buildings containing a large auditorium and other rooms and apartments for any and all purposes of profit, gain and entertainment."

These defendants aver that there was no authority in the statutes or law of the State of Illinois throughout the year 1886 or thereafter for the organization of a corporation for such purpose or with such power, but that the organization of a corporation for such purpose was during all such time contrary to the law and public policy of the State of Illinois, and the exercise of such alleged purpose or power and everything done in pursuance thereof was and is ultra vires of plaintiff. These defendants admit that the said "Auditorium Property" mentioned in said bill is located substantially as therein set forth, and deny that plaintiff acquired title to "certain long term leasehold interests" in said bill mentioned and deny that acquiring title to said interests was necessary and proper for the transaction of plaintiff's business or to carry out any lawful object or purpose designated in its alleged charter or articles of incorporation, but on the contrary, these defendants aver that the acquisition of said leasehold interests was beyond the powers of plaintiff, even assuming that plaintiff had any existence as a corporation.

3. These defendants admit that the various "indentures of lease" and "agreements in writing" mentioned in
243 Paragraphs 3, 4 and 5 of said bill of complaint were executed and delivered as therein alleged and that substantially correct copies thereof are attached to said bill as in said paragraphs alleged, but deny that said indentures of lease or agreements in writing, or any of them, had the effect of giving plaintiff any interest in or to the property described in the "Peck lease" mentioned in said bill or in or to any part of said Auditorium property, but aver that both the execution and the acceptance of all said indentures of lease and agreements in writing by plaintiff were beyond the powers of plaintiff and were void.

4. These defendants say that they are without knowledge as to the averments of Paragraph 6 of said bill.

5. These defendants admit the averments of Paragraph 7 of said bill, except that these defendants say that the allegations as to representation contained in said paragraph of said bill are conclusions of law which these defendants neither admit nor deny.

6. These defendants say that they are without knowledge as to the allegations of Paragraph 8 of said bill.

7. These defendants say that they are without knowledge as to the allegations of Paragraph 9 of said bill.

8. These defendants admit that plaintiff took possession

of the Auditorium property as in Paragraph 10 of said bill alleged and erected thereon one entire building which was completed on or about December 1, 1889, but say that they are without knowledge as to the cost of said building or as to how it was defrayed or as to whether said building was erected with the knowledge or consent or procuration of all or any of the lessors in said several alleged leases or as to whether it was contemplated or intended by all or any of the parties to said alleged leases that a single building not separable into parts apportionable to the separate leases should be
244 erected on said Auditorium property or as to whether the present building was constructed in accordance with such intention, but they admit that the present building could not be dismembered without heavy expense. These defendants are informed and believe that the building on said Auditorium property erected as aforesaid has continued to exist ever since, but are without knowledge as to whether all or any of the subsequent purchasers of said property or any part thereof acquired their interests with knowledge of the "said existing conditions" mentioned in Paragraph 10 of said bill and of the character of said building. These defendants admit that the said agreements in writing, substantially correct copies of which are attached to said bill as Exhibit 5 and Exhibit 7 were executed after the erection of said building, but deny that said building is indivisible and are without knowledge as to whether the "Lessors or their successors in interest" when executing said agreements in writing had full knowledge of the character of said building and deny that such agreements in writing or anything equivalent thereto were executed by all of said "Lessors" or their successors in interest, but on the contrary aver that no such agreement in writing or its equivalent was executed by the owners of the property mentioned as "Parcel 3" in Paragraph 2 of said bill.

9. These defendants are without knowledge whether said building is of a now obsolete type of construction. They admit that the methods of design and construction employed in the erection of said building were the best and most advanced known at the time and deny that they were or are inadequate and improper "from a modern point of view" or otherwise. These defendants are without knowledge as to whether the allegations of Paragraph 11 of said bill as to the methods of construction of a "modern fireproof building of the highest

type" are true as therein alleged, but aver that such alle-
245 gations are insufficient to show what plaintiff means by such modern fireproof building and aver that it is immaterial whether the engineering formulas now employed are the same as those employed at the time of the erection of said building and further aver that all the allegations of said Paragraph 11 are immaterial and that there is nothing in said alleged indentures of lease mentioned in said bill or any of them that requires or contemplates that the building erected should conform to changes of style in buildings or changes of methods of construction that might occur from time to time or that the building or buildings to exist on said Auditorium property should be reconstructed from time to time in accordance with such changes.

10. The defendants deny that since the erection of said building the character of the neighborhood thereof has changed, but on the contrary aver that the uses to which property in the neighborhood of said Auditorium property is put and for which such property is now available are of the same character and description as the uses to which such neighboring property was put in 1886 and at the time of the erection of said building. They further aver that the buildings at present existing on Wabash avenue opposite to said Auditorium property for a distance of many hundred feet both to the north and south thereof and the buildings existing on the west half of the block on Congress street just opposite said property are with rare exceptions the same buildings that existed at the time of the erection of that building or were erected immediately thereafter and are of less proportionate cost and value and of less modern design and construction than the Auditorium Building. These defendants further aver that the Michigan avenue frontage on the west side of Michigan avenue in the neighborhood of said Auditorium property is now devoted to the same uses in general as at the time
246 when said building was erected on said Auditorium property that the class or grade of such property has in no way changed; that the property on the east side of Michigan avenue opposite said Auditorium property and stretching for many block both to the north and south of said Auditorium property has since long before the erection of said Auditorium Building been dedicated to purposes of a public park, known at one time as Lake Front Park and now as Grant Park; that no buildings have ever stood on the portion of said park opposite the block in which the Auditorium property is lo-

cated; that the only buildings on said Grank Park existing at any time from 1886 to the present day have been buildings serving some public purpose. These defendants deny that the vicinity of the Auditorium Building has become the most desirable and coveted location in Chicago for large and expensive hotels, office buildings, fashionable stores, clubs and theaters, but aver that there has been no change in this regard since said Auditorium Building was constructed; that said building is located toward the south end of the eastern edge of the down town district of the City of Chicago; that for more than ten years no new hotels have been erected on Michigan avenue within five or more city blocks of said Auditorium but, in fact, one hotel has been torn down to give way to an office building; that during the same period very numerous and costly first-class hotels have been erected and put into operation in other parts of the city; that during the same period there has been no increase in the number of theaters or auditoriums on said portion of Michigan avenue nor in the city blocks lying immediately west of said portion of Michigan avenue, while numerous theaters and auditoriums have been erected and are now operated in other portions of the city; that it is a matter of grace doubt whether according to the present development and indications of future develop-
247 ment of the City of Chicago the use of the Auditorium property proposed by plaintiff, that is expending $10,000,000 for the erection of a new building "for a hotel, auditorium and safety deposit vaults" would be wise.

11. These defendants admit that since the year 1887 there has been a great enhancement of the value of the land constituting said Auditorium property as described in said bill, and that the several pieces of said land are now worth more than the values stated in Paragraph "14" of said bill. These defendants are without knowledge as to whether the enhancement in said value has been steady or whether there has been a still greater enhancement in the value of the five pieces "if merged into a unit and susceptible of improvement as such" or whether the averments of the valuations placed on the various pieces of said Auditorium property at the time of the signing of said various indentures of lease are correctly stated in Paragraph "13" of said bill.

12. These defendants admit that the calculations stated in Paragraph "15" of said bill as to the present rental valuations of the Peck lease and the Walker leases therein mentioned are correct on the basis of the assumptions made there-

in by plaintiff, but are without knowledge as to the rental now payable under the two Studebaker leases therein mentioned, and aver that the rental payable for the property described in said Peck lease on a five per cent basis of its present value would be much greater than the amount of $25,132.40, as stated by plaintiff, and further aver that, upon the assumption that plaintiff has any right whatever to have recourse to a court of equity in the premises, plaintiff should, as a condition of obtaining any relief in equity, offer to do equity to the extent at least of offering to pay to the present owners of the property described in said Peck lease, in which property alone these defendants are interested, an annual rental of
248 at least five per cent upon the present value of the premises described in said Peck lease. These defendants are without knowledge whether the rental value of similar property to the Auditorium property is generally reckoned at five per cent a year on the value of the property or whether the method of computing the value of plaintiff's alleged leaseholds used in said Paragraph "15" is correct. But these defendants deny that plaintiff's alleged leasehold interests are of the value of $2,094,244 and deny that they have any substantial value, and these defendants aver that plaintiff in arriving at said value, has among other things, assumed that it is entitled to unrestricted dominion over the property described in said Peck lease and said Walker leases, which these defendants deny. These defendants further deny that it is in any way material to the questions involved in this case whether the rental value of said Auditorium property unimproved and unencumbered taken as a unit for building purposes is greater than the aggregate rental value of the various properties taken separately.

13. These defendants are without knowledge as to the facts alleged in the first two sentences of Paragraph "16" of said bill, but aver that such facts are immaterial to any issues in this case, and deny that these defendants or any other defendants or persons interested in the property described in said Peck lease are in any way bound to assist plaintiff in realizing revenue sufficient to meet modern demands of cost of operation, building equipment and service or that plaintiff has any right to appropriate the property described in said Peck lease and appurtenances for such purpose. These defendants are without knowledge as to whether a large amount of settlement has occurred in said building or as to how much said building has settled or as to when such alleged settlement has oc-

curred, but aver that whatever substantial settlement has
249 occurred in said building happened a long time ago and
that the fracturing, if any, alleged in Paragraph "16" of said bill occurred also many years ago, and further aver that for a long time last past there has been no substantial settlement or fracturing of said building, but that said building has come to a rest in a safe, substantial and solid condition and has so remained for many years last past. These defendants are without knowledge as to whether further fractures are likely to occur in said building and as to the future actions of the municipal authorities of the City of Chicago or as to the other matters prophesied in said Paragraph "16". These defendants aver that it is immaterial to any of the issues of this case what the cost may be to the plaintiff of keeping said building or any part thereof in proper repair, or whether the performance by the plaintiff of the duties stated in said indentures of lease, or any of them, will be costly or will make the maintenance of said building unprofitable or whether the plaintiff is unable to finance the cost of performing said indentures of lease or any of them. Plaintiff has not in said Paragraph "16" or elsewhere in said bill averred that it is not possible to maintain said building as a safe and continually existing structure. These defendants aver that it is possible to do so and deny that no amount of care and attention will insure the continued sanitary condition of the plumbing drainage and water supply systems of said building. As to any other allegations contained in said Paragraph "16" these defendants are without knowledge.

14. These defendants say that so far as they are informed and believe, the alleged leasehold interests mentioned in said bill and the said building constitute all the assets of plaintiff, and aver that, if the allegations of fact in said bill as to the indebtedness of plaintiff and its lack of resources and revenue
are true, plaintiff is insolvent, and these defendants,
250 therefore, allege and charge that plaintiff is insolvent and
without financial ability to meet its debts or obligations. These defendants aver that neither they nor any other of the defendants are under any obligations to enable the plaintiff to declare dividends and that the allegation in Paragraph "17" in regard and the remaining allegations in said paragraph contained are immaterial, except in so far as they show that in the past plaintiff's undertaking in the erection of said building and methods of management thereof have been unproductive and unwise and there is therefore little reason to suppose

that plaintiff would be more successful in its new plans and undertakings. And these defendants again deny that the value of plaintiff's alleged leasehold interest is fairly represented by the difference between the present estimated rental value of the land of said Auditorium property unimproved and unencumbered, and the present ground rentals paid by plaintiff as alleged in said bill.

15. These defendants are without sufficient knowledge as to the statements of taxes on said property contained in Paragraph "18" of said bill to answer the same, and are not informed save by said bill as to whether the return from said property over the above taxes and operating expenses is sufficient to meet plaintiff's obligations as they accrue.

16. These defendants aver that it is immaterial to any of the issues of this case whether or not plaintiff is in danger of losing this property through foreclosure proceedings, and neither these defendants nor any other defendants or persons interested in the property described in said Peck lease are under any obligations to avert such foreclosure nor is plaintiff entitled to any other or greater rights in said property on account of such alleged impending foreclosure. These defendants deny that they and the other defendants or persons interested in the property described in the Peck lease would
251 be better protected by any "adequate improvement of the property" proposed by plaintiff. These defendants deny that "the highest and best use of said property" would be the construction of a new building as proposed in Paragraph "19" of said bill by plaintiff and aver that plaintiff has no right or equity in putting said property to its alleged highest and best use or in using said property so as to "avert financial disaster." These defendants are without knowledge as to the remaining averments of said Paragraph "19" but state that they are immaterial to any of of the issues in this case.

17. These defendants cannot deny the statement of plaintiff's wishes contained in Paragraph "20" of said bill as amended, but aver that neither they nor any other defendants or persons interested in the property described in the Peck lease are under any obligation to aid plaintiff in protecting and preserving whatever easements it may have over the Studebaker property mentioned in said paragraph, and aver on information and belief that there is no difference between so much of said building as plaintiff proposes shall not be removed in order to protect such easements and the remainder of such building in regard to obsolescence, matters of construc-

tion, but of date appearance on the other various matters and things which plaintiff has in said bill alleged as reasons why said building should be removed and replaced, that neither these defendants nor any other defendants or persons interested in the property described in said Peck lease or any of their predecessors in title had anything to do with or were bound by any arrangements of plaintiff with the owners of or in regard to said Studebaker property. These defendants deny that the description of said proposed building in said Paragraph "20" as amended or elsewhere in said bill is sufficient to inform the Court or any of the defendants what
252 sort of building plaintiff desires or proposes to erect on said Auditorium property or on what part thereof. These defendants are without knowledge whether the value of the improvement desired by plaintiff upon the property described in said Peck lease would be in excess of the value of the present improvement thereon and are without knowledge of the plans, if any, now under consideration by pulaintiff or whether plaintiff is prepared to undertake and complete such improvement or whether it is able to obtain the necessary funds to do so. These defendants deny that plaintiff is ready and willing to give or can give adequate security for the completion of such proposed improvement so that these defendants and the other defendants and parties interested in the property described in said Peck lease shall have all protection and security in their rights enjoyed under such Peck lease or otherwise and deny that any security would be adequate for such purposes. These defendants show that there is nothing in said Peck lease contained that authorizes the substitution of any other security for the security stated in said lease or that gives power to this or any other Court, Arbitrator or person to determine upon any such substituted security or to alter in any way the duties and obligations stated in said Peck lease. And these defendants deny that plaintiff had or has any power under the terms of its alleged charter in its original form, or as amended, to erect or maintain a building adapted for a hotel, auditorium and safety deposit vaults. These defendants deny that under the proper construction and interpretation of said Peck lease plaintiff has the right to tear down and remove the present improvement existing on the property therein described for the purpose of erecting a new improvement thereon or for any other purpose. These defendants are without knowledge as to what persons plaintiff is "obliged" to deal with in financing its plans or as to whether such per-

sons are fearful of the things set forth in said Paragraph
253 "20" as amended. These defendants aver that if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste and will give the owners of the land described in said Peck lease, according to the terms thereof, the right to reenter and repossess themselves of such land free of any and all claims or rights of plaintiff. These defendants deny that any claims, fears and uncertainties mentioned in said bill have greatly or at all impaired the value of plaintiff's alleged leasehold interests or have made them unmarketable or have prevented plaintiff from exercising any rights it has with respect thereto, but aver that, if the other facts stated in said bill of complaint are true, said alleged leasehold interests, if valid, are without value. These defendants further deny that any such alleged claims, fears or uncertainties are clouds upon plaintiff's title. These defendants are without knowledge as to plaintiff's hopes. These defendants aver that their property interests and those of the other defendants and persons interested in the property described in said Peck lease are of great value and that it is reasonable that defendants should be unwilling to surrender or change them without adequate compensation and that such interests are, like other property rights, properly subject to purchase and sale.

18. These defendants deny that the matter stated in the first sentence of Paragraph "21" of said bill presents a common issue of law and fact with respect to the interests of the various defendants owning or interested in the fee of said property, but are without knowledge concerning the remaining facts or averments of said Paragraph "21" as amended.

19. These defendants answering Paragraph "22" of said bill admit that there are provisions in said Peck lease for payment at the end of the term by the lessors to the lessee
254 of the cash value of the buildings and improvements then on said premises, all of which is shown more fully in the copy of said Peck lease set out as Exhibit 6 to said bill, and these defendants aver that the existence of such provisions in said Peck lease taken with the other provisions of said lease is wholly inconsistent with the alleged right of complainant either with or without the approval or consent of this Court to erect on the premises described in said Peck lease and without the consent of the lessors therein or their successors in interest any other or different buildings or improvements than

now stand thereon and these defendants show that there is no provision in said Peck lease or elsewhere providing for submission to this or any other court of the question of what changes shall seem equitable with respect to the provisions for payment above mentioned or to determine whether and how far such provisions should be waived by complainant, but aver that no one except the lessors under said Peck lease or their successors in interest have the right to or can determine what if any waiver or change in that regard would be acceptable, nor is there any right in this court or any one save the successors in interests to the lessors under said Peck lease to change the terms thereof.

20. Defendants further answering say that in addition to the matters, facts and reasons above allaged, the plaintiff is not entitled to any relief herein, but a decree should be entered herein dismissing plaintiff's said bill as amended for want of equity, for the following reasons:

(a) The plaintiff seeks to obtain a declaratory decree setting out the legal rights of the parties and construing the various alleged leases and amendatory agreements mentioned in said bill, and it is not within the jurisdiction or according to the practice of courts of equity to entertain a bill for such purpose, or to enter such a decree.

255 (b) Said bill is not maintainable as a bill to remove cloud or clouds on title, for there is not pointed out in said bill anything constituting or amounting to a cloud on the title of any property or rights of plaintiff, nor is any such supposed cloud on title sufficiently set forth or described in said bill, nor is plaintiff entitled to have any portion of the leases, under which he claims title, set aside as a cloud on the title derived from such lease or leases, and there are not in said bill alleged, nor do there exist, any such sufficient extrinsic facts to justify a decree removing any cloud on title.

(c) That according to the terms of said Peck lease, as appears from Exhibit 6 attached to said bill, said plaintiff has covenanted to keep the said building now on the premises described in said Peck lease in good repair and in a safe and secure condition and to keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of said lease, and the proposed tearing down of said building, whether for the purpose of erecting a new building or otherwise, would be a breach by plaintiff of such covenants.

(d) That the proposed acts of plaintiff in tearing down said building would be and constitute waste and that no court should authorize the commission of wsate.

(e) That any claim of plaintiff's based on the alleged fact that said building was not a proper building to be erected under the terms of said Peck lease is founded upon the plaintiff's own wrong and breach of covenant.

(f) That any such claim is a stale claim and that plaintiff is guilty of laches in not presenting it earlier.

(g) That the said amendatory instrument dated July 10, 1891, between the plaintiff and Francis Bartlett and others, a copy of which is attached to said bill as Exhibit 7, was
256 executed when the building now existing on the premises in the Peck lease was complete and on the basis of the erection of said building as a compliance with the terms of said Peck lease and on the understanding that the amendatory instrument applied to said building and premises, so that if, in any event, plaintiff could be heard to assert that said building was or has become an improper building to be erected or maintained on said premises, or could be authorized to tear down said building for the purpose of erecting a new building or otherwise, plaintiff should only be accorded such relief upon offering to do equity in setting aside and annulling said amendatory instrument.

(h) That said building was erected by plaintiff under the terms of said Peck lease and in purported compliance therewith, and plaintiff is now estopped to assert that said building was not erected in compliance with the terms of said Peck lease and should not be maintained by it as long as it holds the premises described in said Peck lease under said Peck lease and said amendatory agreement.

(i) That the ownership of the building and improvements situated on the premises described in said Peck lease is in the defendants, and that plaintiff has no ownership in or right to destroy said buildings or improvementss, or any part thereof, and has no right to appropriate the property of these defendants for plaintiff's own private purposes, and that no court should enter a decree or judgment to that end, that an entry of the decree or judgment in accordance with the prayer of said bill would effect the taking of the property of these defendants for private purposes and without compensation and without due process of law, contrary to the provisions of the Constitution of the State of Illinois and of the Constitution of

the United States. And that the taking of any of the
257 rights or property of any of the defendants under such a decree, whether with or without compensation, would be depriving such defendants of their property for private purposes contrary to the Constitution of the State of Illinois and the Constitution of the United States.

(j) That in case said Peck lease be held valid, the substitution by the Court of other security for the security stated in said Peck lease, or the altering by the Court of any of the duties and obligations of plaintiff stated in said lease, or the decision by the Court of what waivers or changes in the provisions of said lease regarding the payment by the lessors for the value of the buildings or improvements at the end of the term should or must be acceptable to the successors in interest of said lessors, or the authorization by the Court of the commission of waste by said plaintiff or the authorization by the Court of the tearing down of the building now on the premises described in said Peck lease, or the taking away or change of the rights or interests of these defendants in the property described in said Peck lease without the consent of these defendants, would be and each of them would be a taking of the property and rights of these defendants without due process of law and without compensation, and would deny these defendants equal protection of the law, all in contravention of the Constitution of the United States and of the Constitution of the State of Illinois.

(k) That no relief asked for by plaintiff in said bill or founded upon the allegation of said bill could be granted without alteration by the Court of provisions of said Peck lease aid said amendatory agreement, or in effect making a new lease or contract between the plaintiff and the successors in interest of the lessors in said Peck lease; that the question of what these defendants are willing to do with or concerning their property is for them to determine, and that no court has right or jurisdiction to determine such question, no
258 should any court make a contract for these defendants.

That plaintiff does not have or claim any right, title or interest in or to the premises described in said Peck lease except under said lease and said amendatory agreement of July 10, 1891, and that plaintiff should not be allowed to and is estopped to claim the benefit of said instruments and yet escape the burdens thereof.

21. These defendants further answering show that the erection of more costly or valuable improvements than the

present building on the premises described in said Peck lease will add to the burdens on said premises in the following particulars:

It will increase the amount of taxes which, under the laws of the State of Illinois, will year after year become a lien upon said premises. It will subject said premises to the danger of mechanic's lien and other liens that may arise in connection with the erection of such proposed improvements. In case of the termination of the rights of plaintiff in the premises described in the Peck lease, for any reason, it will increase the expense of separating the portion of said proposed new building located on said premises from the portion thereof located on the other parts of the Auditorium property mentioned in said bill, and it is contrary to equity and good conscience to increase the burdens upon the premises described in the Peck lease for the benefit of the plaintiff and against the will or without the consent of defendants.

22. These defendants further answering aver that by said Peck lease and amendatory agreement it was provided that a building should be erected on the premises therein described, not that a part of a building should be thereon erected and that whether or no it be true as alleged by plaintiff in Paragraph "10" thereof that the parties to said lease intended that a single building not separable into por-
259 tions should be erected on the entire auditorium property, it is not alleged in said bill nor claimed by plaintiff that there was any agreement that more than one such single building should be erected on said entire Auditorium property, so that even if it could be held that plaintiff had the right to destroy the present building or improvements on the premises described in said Peck lease, yet plaintiff would not nor could it in equity be given the right to construct anything else than a building on said premises complete, separate and apart from a building or buildings erected on other premises.

23. And these defendants deny the plaintiff is without remedy except in a court of equity and on the contrary assert that any matters of difference between plaintiff and these defendants are cognizable in a court of law, and that there is no matter stated in said bill which shows the existence of any right to relief in plaintiff against these defendants, or any of them, in a court of equity or elsewhere.

24. And further answering these defendants show that in said Peck lease it is among other things provided that

the plaintiff should pay all costs and attorneys' fees which might be incurred by the lessors in enforcing the covenants and agreements of that lease and that all covenants and agreements thereof should extend to and be binding upon the successors and assigns of the respective parties thereto, and that if said lease is held to be valid, defendants are entitled to be reimbursed by the plaintiff for all their costs and attorneys' fees expended in defending this suit.

25. And these defendants deny any and all matters or allegations contained in said bill as amended not hereinbefore sufficiently answered and they pray the same advantage of this answer as of a demurrer or motion to dismiss.

260 And now having fully answered these defendants pray to be hence dismissed with their costs in this behalf sustained.

Respectfully submitted,

WILLIAM A. SLATER,
CHARLES L. HARRISON,
HALSEY MALONE,
Trustees under the Last Will and Testament of William A. Slater, Deceased.

WILLIAM A. SLATER,
ELLEN B. SLATER,
ELEANOR MALONE,
ELIZABETH SEARS WARREN,
PHYLLIS SEARS TUCKERMAN,
BAYARD WARREN,
BAYARD TUCKERMAN, JR.,
Trustees.

By PERKINS MALONE & WASHBURN,
ADAMS FOLLANSBEE HAWLEY & SHOREY,
Their Solicitors.

SAMUEL ADAMS,
MITCHELL D. FOLLANSBEE,
WATSON WASHBURN,
JOHN E. GAVIN,
Counsel for said Defendants.

(Endorsed) Filed June 14, 1924, John H. R. Jamar, Clerk.

June 21. 261 And on to-wit: the 21st day of June A. D. 1924, there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit:

262 • • • • • •

The Answer of John Fox Slater, Elena de Struve, Boris de Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Camilla Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, Minors, Defendants in the Above Entitled Proceedings, by Roswell B. Mason, Their Duly Appointed Guardian ad Litem, to the Bill of Complaint as Amended of The Chicago Auditorium Association, the Complainant.

These defendants, John Fox Slater, Elena de Struve, Boris de Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Camilla Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, answering by their guardian ad litem say that they are infants; that they have no knowledge of the allegations and matters contained in said bill of complaint as amended; and they therefore submit their rights and interests in the matters in question in this cause to the tender consideration of this honorable court and pray strict proof of the matters and things alleged in said bill of complaint as amended.

JOHN FOX SLATER,
ELENA DE STRUVE,
BORIS DE STRUVE,
ADRIAN MALONE,
BAYARD WARREN, JR.,
LILY WARREN,
CAROLINE SEARS WARREN,
PHYLLIS TUCKERMAN,
RICHARD MORTIMER TUCKERMAN,
HERBERT TUCKERMAN,
By ROSWELL B. MASON,
Their Guardian ad Litem.

(Endorsed) Filed June 21, 1924, John H. R. Jamar, Clerk.

263 And on to-wit: the 9th day of October A. D. 1924, there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit: Filed O 1924.

264 * * * * * *

The Answer of Emily S. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, All as Trustees Under the Last Will and Testament of Charles A. Chapin, Deceased; Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin, Charles Douglas Chapin and Charlotte Gardiner Robertson, as Individuals, to the Bill of Complaint, as the Same is Amended and Supplemented.

The Defendants above named as joining in this Answer, for answer to the Bill of Complaint as amended and supplemented, say:

First: They Admit the allegations made in the paragraph of the Bill of Complaint as amended and supplemented and numbered 1; so much of the paragraph numbered 2, as pertains to the erection of a building on certain land therein described as "Parcel 3", and as to the location of said land in relation to the Parcels referred to in said paragraph; paragraphs numbered 5 and 8, except as to the allegation that the building was so erected as to preserve the casements appertaining to Parcel 3 or the owners thereof, and also except as to the allegations contained in said paragraph
265 8, as to the character anr quality of the title which is vested in the persons therein named, and as to the capacity in which the same is vested; said defendants also Admit the allegations contained in the paragraph of said Bill of Complaint, as amended and supplemented, numbered 10, insofar as said allegations pertain to the occupancy under the two (2) Studebaker Manufacturing Company Leases.

Second: Further Answering said Bill of Complaint as amended and supplemented, these defendants say as to the paragraphs thereof, numbered 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13,

14, 15, 16, 17, 18, 19, 20, 21 and 22, they have no knowledge with respect to said allegations sufficient to enable them to Admit or Deny the same, excepting as to certain portions thereof specifically admited in the foregoing parts of this Answer and except as to certain portions thereof that are hereinafter specifically denied; and with respect to all of the paragraphs mentioned in the Second paragraph of this Answer, not so specifically admited or denied, these defendants neither Admit nor Deny the same, but call for strict proof thereof.

Third: Further Answering said Bill of Complaint, as amended and supplemented, these Defendants Deny the allegations of paragraph 20, thereof, that set forth the construction and interpretation of the terms, covenants and conditions of the several leases therein mentioned and that allege the construction thus set forth to be the proper construction thereof. These defendants Deny the allegation of paragraph 21 of said Bill of Complaint as ameded and supplemented to the effect that the question whether the complainant has the right to remove and replace the building now upon the premises therein mentioned, is one that as between complainant and the defendants therein interested in the fee simple of said property, presents a common issue of law and fact substantially identical with respect to the interest of said several defendants.

These Defendants show unto the court that the agreements between the Studebaker Brothers Manufacturing Company and Complainant, which are set forth in the first amendment to the Bill of Complaint, as an amendment to paragraph 5 of the original Bill of Complaint, establish rights with respect to the land designated as "Parcel 3", which have devolved upon some of these defendants that are wholly different and distinct from the rights pertaining to any of the other tracts of land described in the Bill of Complaint or the owners thereof.

Fourth: These Defendants Deny that complainant is entitled to the relief or any part thereof to which the complainant in the Bill of Complaint, as amended and supplemented, claims itself to be entitled at the hands of this court; and these defendants claim the same benefit for this Answer as they might be entitled to receive upon a Demurrer to said Bill of Complaint, and they Pray that they may be hence

dismissed without date, with their costs and charges in this behalf expended.

EMILY C. CHAPIN,
HOMER COOLIDGE CHAPIN,
266 SARAH LUCILE CHAPIN SMITH,
HELEN EVELYN CHAPIN BISHOP,
HENRY KENT CHAPIN,
RUBY CHAPIN PITNER,
LOWELL MEAD CHAPIN,
CHARLES DOUGLAS CHAPIN,
All as Trustees under the Last Will and Testament of Charles A. Chapin, deceased.
HOMER COOLIDGE CHAPIN,
SARAH LUCILE CHAPIN SMITH,
HELEN EVELYN CHAPIN BISHOP,
HELEN EMILY BISHOP,
HENRY KENT CHAPIN,
RUBY CHAPIN PITNER,
LOWELL MEAD CHAPIN,
CHARLES DOUGLAS CHAPIN,
CHARLOTTE GARDINER ROBERTSON,
As individuals, to the Bill of Complaint, as the same is amended and supplemented.
By KING, BROWN & HULBURT,
Their Solicitors.

KING, BROWN & HULBURT
Solicitors for said Defendants

(Endorsed) Filed October 9, 1924, John H. R. Jamar, Clerk.

267 And on to-wit: the 12th day of December A. D. 1924, there was filed in the Clerk's Office of said Court a certain Answer in words and figures following, to-wit:

268 • • • • • •

Dec. 12, THE ANSWER OF COOLIDGE MEAD CHAPIN, A MINOR DEFENDANT IN THE ABOVE ENTITLED CAUSE, BY HENRY RUSSELL PLATT, HIS DULY APPOINTED GUARDIAN AD LITEM, TO THE BILL OF COMPLAINT AS AMENDED OF THE CHICAGO AUDITORIUM ASSOCIATION.

Now comes Coolidge Mead Chapin, by Henry Russell Platt, his duly appointed Guardian ad litem, and, answering the bill of complaint as amended filed by the Chicago Auditorium Association in the above entitled matter, says that said Coolidge Mead Chapin is a minor, and that he has no knowledge of the allegations and matters contained in said bill of complaint as amended, and therefore submits his rights and interests in the matters in question in this cause to the tender consideration and protection of this honorable Court, and prays strict proof of the matters and things alleged by the complainant in the said bill of complaint as amended.

HENRY RUSSELL PLATT,
Guardian ad litem.

(Endorsed) Filed December 12, 1924, John H. R. Jamar, Clerk.

268a And on to-wit: the 31st day of December A. D. 1924, there was filed in the Clerk's Office of said Court a certain Motion to Remand in words and figures following, to-wit:

268b • • • • • •

MOTION TO REMAND.

Now comes Louis M. Greeley, guardian ad litem for Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr., infant defendants, and moves the Court to remand the above entitled cause to the Circuit Court of Cook County, in the State of Illinois, upon the following grounds:

1. The bill of complaint in the above entitled cause, at the time the same was filed in the Circuit Court of Cook

County, in the State of Illinois, and at the time of the filing in said Court of the Petition of certain defendants to remove said cause from said Court to this Court, did not state
268c or present a controversy which is wholly between citizens of different states and which can be fully determined as between them.

2. The cause of action as set forth in said bill of complaint at said several times is single and indivisible.

3. The subject matter of the controversy set forth in said bill of complaint at said several times is single and entire.

4. The bill of complaint at said several times set forth no separable controversy between the complainant and the defendants joining in the petition for removal which can be fully determined as between them without the presence of the other defendants in the case, or some of them.

5. There are parties defendant indispensable to the determination of the above entitled cause who are citizens of the State of Illinois, being the same state under the laws of which the complainant corporation was organized and is existing.

6. The record in the above entitled cause discloses no grounds of federal jurisdiction.

7. The record discloses no grounds for the removal of said cause from said Circuit Court of Cook County, in the State of Illinois, to this Court.

LOUIS M. GREELEY,
Guardian Ad Litem of Infant Defendants, Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

(Endorsed) Filed December 31, 1924, John H. R. Jamar, Clerk.

269 And on to-wit: on the 2nd day of February A. D. 1925, there was filed in the Clerk's Office of said Court a certain Motion to Remand in words and figures following, to-wit:

270 • • • • • •

MOTION TO REMAND.

Feb. 2. Now comes the Northern Trust Company and Mark Skinner Willing as Trustees of the Estate of Henry J. Willing, deceased, and move the Court to remand the above entitled cause to the Circuit Court of Cook County, in the State of Illinois, upon the following grounds:

1. The bill of complaint in the above entitled cause, at the time the same was filed in the Circuit Court of Cook County, in the State of Illinois, and at the time of the filing in said Court of the petition of certain defendants to remove said cause from said Court to this Court, did not state or present a controversy which is wholly between citizens of different states and which can be fully determined as between them.

2. The cause of action as set forth in said bill of
271 complaint at said several times is single and indivisible.

3. The subject matter of the controversy set forth in said bill of complaint at said several times is single and entire.

4. The bill of complaint at said several times set forth no separable controversy between the complainant and the defendants joining in the petition for removal which can be fully determined as between them without the presence of the other defendants in the case, or some of them.

5. There are parties defendant indispensable to the determination of the above entitled cause who are citizens of the State of Illinois, being the same state under the laws of which the complainant corporation was organized and is existing.

6. The record in the above entitled cause discloses no grounds of federal jurisdiction.

7. The record discloses no grounds for the removal of said cause from said Circuit Court of Cook County, in the State of Illinois, to this Court.

THE NORTHERN TRUST COMPANY and
MARK SKINNER WILLING,
as Trustees of the Estate of Henry J. Willing, deceased.
By SAMUEL TOPLIFF,
HOMER H. COOPER,
Their Solicitors.

(Endorsed) Filed February 2, 1925, John H. R. Jamar, Clerk.

272 And on to-wit: the 2nd day of February A. D. 1925 Filed F 1925.
there was filed in the Clerk's Office of said Court a certain Motion to Remand in words and figures following, to-wit:

273 • • • • • •

MOTION TO REMAND.

Now comes Mark Skinner Willing, individually, and moves the Court to remand the above entitled cause to the Circuit Court of Cook County, in the State of Illinois, upon the following grounds:

1. The bill of complaint in the above entitled cause, at the time the same was filed in the Circuit Court of Cook County, in the State of Illinois, and at the time of the filing in said Court of the petition of certain defendants to remove said cause from said Court to this Court, did not state or present a controversy which is wholly between citizens of different states and which can be fully determined as between them.

2. The cause of action as set forth in said bill of
274 complaint at said several times is single and indivisible.

3. The subject matter of the controversy set forth in said bill of complaint at said several times is single and entire.

4. The bill of complaint at said several times set forth no separable controversy between the complainant and the defendants joining in the petition for removal which can be fully determined as between them without the presence of the other defendants in the case, or some of them.

5. There are parties defendant indispensable to the determination of the above entitled cause who are citizens of the State of Illinois, being the same state under the laws of which the complainant corporation was organized and is existing.

6. The record in the above entitled cause discloses no grounds of federal jurisdiction.

7. The record discloses no grounds for the removal of said cause from said Circuit Court of Cook County, in the State of Illinois, to this Court.

MARK SKINNER WILLING, individually,
By SAMUEL TOPLIFF,
HOMER H. COOPER,
His Solicitors.

(Endorsed) Filed February 2, 1925. John H. R. Jamar, Clerk.

Feb. 2. 275 And on to-wit: on the 2nd day of February A. D. 1925 the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

276 • • • • • • •

Monday, February 2, 1925.

Present: Honorable James H. Wilkerson, Judge of said Court:

On motion of Attorney for Mark Skinner Willing, individually, It Is Ordered that leave be and the same is hereby given him to file instanter, his motion to remand the above entitled cause to the Circuit Court of Cook County, Illinois.

Whereupon, it is ordered by the Court that said motion to remand be and the same is hereby overruled.

Feb. 2. 277 And on to wit: the 2nd day of February A. D. 1925 the following proceedings were had and entered of record in said Court in words and figures following, to wit:

278 • • • • • • •

Monday, February 2, 1925.

Present: Honorable James H. Wilkerson, Judge of said Court:

On motion of Attorney for the defendants, The Northern Trust Company and Mark Skinner Willing as Trustees, It Is Ordered that leave be and the same is hereby given them to file instanter their motion to remand the above entitled cause to the Circuit Court of Cook County, Illinois.

Whereupon, it is ordered by the Court that said motion to remand be and the same is hereby overruled.

279 And on to wit: the 2nd day of February A. D. 1925, the following proceedings were had and entered of record in said Court in words and figures following, to wit:

280 • • • • • •

Monday, February 2, 1925. Entered 1925

Present: Hon. James H. Wilkerson, Judge of said Court:

This cause coming on to be heard upon motion of Louis M. Greeley, Guardian Ad Litem for certain minor defendants, to remand the above entitled cause to the Circuit Court of Cook County, and the Court being now fully advised in the premises.

It Is Ordered that said motion to remand be and the same is hereby overruled, thereupon, on motion of attorney for Carl C. Bullock, It Is Ordered that leave be and the same is hereby given to file intervening petition in subordination to main case.

It Is Further Ordered that this cause be set for trial April 7, 1925.

327 And on to wit: the 23rd day of February A. D. 1926, there was filed in the Clerk's Office of said Court a certain Condensed Statement of Evidence in words and figures following, to wit: Stater Evi filed 1926

329 • • • • • •

STATEMENT OF EVIDENCE.

On May 26, 1925, before the Honorable James H. Wilkerson, one of the Judges of said Court, this cause came on for trial.

Fisher, Boyden, Kales & Bell, by Walter L. Fisher and William W. Case, appeared for the Plaintiff;

Hamlin, Topliff & Cooper, by Samuel Topliff and Homer H. Cooper, appeared for The Northern Trust Company, et al., as Trustees of the Estate of Henry J. Willing deceased, and for Mark S. Willing.

Follansbee, Shorey & Schupp, by Mitchell D. Follansbee; and Perkins, Malone & Washburn, by Watson Washburn and John E. Gavin, appeared for the Trustee under the last will and testament of William A. Slater, deceased, and for William A.

Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren, Phyllis Sears Tuckerman, and Bayard Warren, Jr., and Bayard Tuckerman, Jr., Trustees.

330 King, Brower & Hurlbut, by Harry R. Hurlbut, appeared for the Trustees under the will of Charles A. Chapin, deceased, and for Charlotte Gardiner Robertson and Helen Emily Bishop.

McCulloch & McCulloch appeared for the Illinois Trust & Savings Bank, afterwards Illinois Merchants Trust Company, Trustee.

Roswell B. Mason appeared as guardian ad litem for John Fox Slater and certain other infant defendants, and was at times represented in court by Henry E. Miller.

Louis M. Greeley appeared as guardian ad litem for Margaret Willing and certain other infant defendants.

Henry Russell Platt appeared as guardian ad litem for Holland Bishop and certain other infant defendants.

Elting & Judson, by Victor Elting, appeared for the Trustees under the last will and testament of Mary E. Shields, deceased, and certain other defendants.

George W. Gordon appeared for First Trust & Savings Bank, and certain other defendants.

Butz, Von Ammon & Marx, by Robert J. Colson, appeared for Carl C. Bullock.

Plaintiff offered in evidence certain documents, which were received in evidence and marked as follows:

Plaintiff's Exhibit 1. Certificate of incorporation of Chicago Grand Auditorium Association dated December 7, 1886 and recorded in the office of the Recorder of Cook County, Illinois, December 8, 1886, in book 20 of Corporation Records, at page 380, as document No. 779853. Wirt D. Walker,
331 Ferdinand W. Peck and others propose to form a corporation with capital stock of $750,000, the name of which is Chicago Grand Auditorium Association and the object of which is set forth in words and figures in paragraph 1 of the original bill of complaint.

Plaintiff's Exhibit 2. Certificate dated January 15, 1887,

of increase of capital stock of Chicago Grand Auditorium Association to $1,500,000 and of change of name of said corporation to Chicago Auditorium Association, was recorded in Recorder's Office of Cook County, Illinois, January 15, 1887, in book 1971 of records, page 536 as document No. 790,405.

Plaintiff's Exhibit 3. Certified copy of same filed in office of Secretary of State of the State of Illinois, January 17, 1887.

Plaintiff's Exhibit 4. Certificate dated December 10, 1889 of increase of capital stock of Chicago Auditorium Association to $2,000,000; recorded in said Recorder's Office December 10, 1889, in book 33 of Corporation Records, page 38 as document No. 1,196,021.

Plaintiff's Exhibit 5. Certified copy of same filed in office of Secretary of State, December 11, 1889.

Plaintiff's Exhibit 6. Certificate dated January 16, 1923, of change of objects of Chicago Auditorium Association as set forth in paragraph 1 of the bill of complaint herein;
recorded in Recorder's Office of Cook County, Illinois,
332 January 17, 1923, in book 337 of Corporation Records,
page 163 as document No. 7,779,534.

Plaintiff's Exhibit 7. Lease dated January 17, 1887, and recorded August 22, 1887, in book 2129 of records, at page 183, as document No. 863,551, from Wirt D. Walker to Chicago Auditorium Association of which Exhibit 2 attached to bill of complaint is a true copy.

Plaintiff's Exhibit 8. Certified copy of power of attorney dated January 29, 1890, and recorded in said Recorder's Office February 26, 1890, in book 2827 of records at page 157, as document No. 1,227,059, whereby Wirt D. Walker appoints James R. Walker his attorney-in-fact to make and execute contracts for the sale of real estate and to grant, bargain, sell and convey any and all real estate of said Wirt D. Walker wheresoever situated.

Plaintiff's Exhibit 9. Certified copy of deed dated March 17, 1890 and recorded in said Recorder's Office March 19, 1890, in book 3096 of records, at page 10, as document No. 1,236,921, whereby The Chicago Auditorium Auxiliary Company, a corporation of the State of Illinois, Wirt D. Walker, a bachelor, and James R. Walker and wife, convey to Henry J. Willing for a consideration of $475,000 lots 7, 9, and the south 54 feet of lot 8, and sublots 1 and 4 in Ely and Reynolds' Subdivision of lot 10, all in block 9 in fractional section fifteen

addition to Chicago, and all interest in the vacated alley
333 adjacent to a part of said premises.

Plaintiff's Exhibit 10. Agreement dated July 9, 1891, and recorded in said Recorder's Office August 5, 1891, in book 3474 of records, at page 549, as document No. 1,515,340, between Chicago Auditorium Association and Henry J. Willing, of which Exhibit 3 attached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 11. Lease dated January 17, 1887 and recorded in said Recorder's Office August 22, 1887, in book 2147 of records, at page 11, as document No. 863,552, between Wirt D. Walker and Chicago Auditorium Association, of which Exhibit 4 attached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 12. Agreement dated July 9, 1891 and recorded in said Recorder's Office August 5, 1891, in book 3427 of records, at page 559, as document No. 1,515,341, between Chicago Auditorium Association and Henry J. Willing, of which Exhibit 5 attached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 13. Lease dated January 24, 1887 and recorded in said Recorder's Office July 29, 1887, in book 2106 of records, at page 473, as document No. 855,865, from Walker L. Peck, Clarence I. Peck and Ferd. W. Peck to Chi-
cago Auditorium Association, of which Exhibit 6 at-
334 tached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 14. Certified copy of warranty deed dated February 2, 1889 and recorded in said Recorder's Office February 4, 1889, in book 2478 of records, at page 457, as document No. 1,058,365, whereby Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck and their wives, for a consideration of $232,200, convey and warrant to Francis Bartlett of Boston, Massachusetts, Trustee for Caroline Bartlett under the will of John F. Slater, and to William A. Slater of Norwich, Connecticut, as tenants in common, the premises demised by the last mentioned lease to Chicago Auditorium Association recorded as document No. 855,865; said conveyance being stated to be subject to said lease to the Chicago Auditorium Association for the term of 99 years.

Plaintiff's Exhibit 15. Agreement dated July 10, 1891 and recorded in said Recorder's Office August 7, 1891 in book 3426 of records, at page 526, as document No. 1,516,570, between Francis Bartlett, Trustee, and William A. Slater, of the first part, and Chicago Auditorium Association, of the

second part, of which agreement Exhibit 7 attached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 16. Lease dated February 1, 1887 and recorded in said Recorder's Office July 19, 1887, in book
335 2106 of records, at page 377, as document No. 852,541, between Studebaker Brothers Manufacturing Company and Chicago Auditorium Association, of which Exhibit 8 attached to the original bill of complaint is a true copy.

Plaintiff's Exhibit 17. Lease dated February 1, 1887 and recorded in said Recorder's Office July 19, 1887, in book 2074 of records, at page 545, as document No. 852,543, between Studebaker Brothers Manufacturing Company and Chicago Auditorium Association, being substantially in the same words and figures as Plaintiff's Exhibit 16, except that the premises demised are described as lot 19 instead of lot 18, and the frontage on Michigan Avenue is given as 26 feet instead of 26.67 feet, and the rent specified for the first year of the term is one dollar instead of $1050.

Plaintiff's Exhibit 18. Agreement dated February 1, 1887 and recorded in said Recorder's Office July 19, 1887, in book 2079 of records, at page 390, as document No. 852,542, between Studebaker Brothers Manufacturing Company and Chicago Auditorium Association, of which (with the exception of the plans and specifications referred to therein) Exhibit 9 attached to the bill of complaint as amended December 28, 1923 is a true copy.

Plaintiff's Exhibit 19. Certified copy of supplementary agreement dated September 30, 1887 and recorded in said
336 Recorder's office January 6, 1888, in Book 2170 of records, at page 479, as document No. 911,452, between Studebaker Brothers Manufacturing Company and Chicago Auditorium Association, of which Exhibit 10 attached to the bill of complaint as amended December 28, 1923, is a true copy.

STEPHEN G. MORSE, a witness for the plaintiff, produced two trust deeds which were offered in evidence. Before they were received counsel for defendants made the following objection:

Mr. Cooper: If the Court please, as to the document which is now offered, defendants represented by us wish to object on the ground that it is irrelevant and immaterial to any

issue in this case. Perhaps it would be proper at this time—it may be more apparent when other evidence is offered—to express briefly the nature of the objection.

As I said, the objection is that it is irrelevant and immaterial. The reasons are, first, that the testimony does not concern or tend to prove any allegation in the bill of complaint as amended, which entitles the plaintiff to any relief whatsoever; that the testimony does not show or tend to show that the defendants or any of them have done any act or acts which in law, in fact or in equity cloud or tend to cloud the title of the complaint to its leasehold interests. They are further irrelevant and immaterial in that the testimony does not show or tend to show that the defendants or any of them have caused or threatened to do or omitted to do any act which is in any way derelict or wrong against the complainant, or gives them any cause of action; that the testimony has no bearing whatever upon any issue which is raised by the pleadings which in law or in equity constitutes a controversy
337 the Court has jurisdiction to determine.

I realize that in making these statements of some of the reasons this testimony we contend is irrelevant and incompetent, I am bringing back to your Honor's attention our whole legal controversy in the case. However, for the purpose of protecting ourselves in the record I desire to make this objection which may be conveniently termed our general objection on the law.

The Court: The objection is overruled.

Mr. Washburn: I would like to enter the same objection.

The Court: Same ruling on your objection.

Thereafter in the course of the presentation of evidence by the plaintiff, counsel for the Willing defendants and the Sears-Slater defendants and the guardians ad litem for the minor defendants interested under the Willing and the Sears-Slater estates reepated said general objection from time to time. After several such repetitions, it was agreed that said general objection stod and it still stands to all the evidence offered by the plaintiff from and after the offer of the exhibits produced by the witness Morse.

Said objections were overruled by the court throughout the case.

The trust deeds which were then offered and received in evidence are as follows:

Plaintiff's Exhibit 20. Trust Deed from Chicago Auditorium Association to Illinois Trust & Savings Bank dated

February 1, 1889 and recorded in the Recorder's Office of Cook County, Illinois, February 4, 1889, in book 2515 of records, at page 61, as document No. 1,058,261, con-
338 veying all the leasehold interest of said Chicago Auditorium Association for 99 years from August 1, 1886, in all the land described in said bill of complaint as the Auditorium property, to secure an authorized issue of bonds of said Chicago Auditorium Association not exceeding $900,000 dated February 1, 1889 and due any payable February 1, 1929, with interest at 5 per cent per annum, payable semi-annually. Said Trust Deed provides that in case of default for 30 days in the payment of any such installment of interest, the whole principal sum secured thereby shall at the election of the legal holders of not less than one-half of the outstanding bonds become at once due and payable.

339 Plaintiff's Exhibit 21. Trust Deed from Chicago Auditorium Association to Illinois Trust & Savings Bank dated February 1, 1892, and recorded in said Recorder's Office June 30, 1892, in book 3916 of records, at page 145, as document No. 1,693,161, securing the consolidated mortgage bonds of said Chicago Auditorium Association of the denomination of $1,000 each, in an aggregate amount not exceeding $1,600,000, dated February 1, 1892 and due February 1, 1942, with interest at the rate of 5 per cent. per annum, payable semi-annually. Said Trust Deed conveys the leasehold interest of said Chicago Auditorium Association for 199 years from August 1, 1886 in the lands and premises described in and demised by the two leases from Wirt D. Walker and the lease from Clarence I. Peck, et al. above described and referred to as Plaintiff's Exhibits 7, 11 and 13, and also the leasehold interest of said Chicago Auditorium Association for 99 years from August 1, 1886, in said premises described in and demised by the two leases from Studebaker Brothers Manufacturing Company hereinabove described and referred to as Plaintiff's Exhibits 16 and 17. Said Trust Deed contains in substance the provisions hereinabove referred to as contained in Plaintiff's Exhibit 20. Said Trust Deed recites that the Chicago Auditorium Association has already issued its first mortgage bonds amounting to $900,000 and also its 6% debenture bonds dated April 1, 1890, payable 5 years after date, of which $497,000 are outstanding, and that it is further indebted in the amount of about $200,000, and that the Board of Directors of Chicago Auditorium Association

has resolved that for the purpose of consolidating and funding its entire indebtedness and retiring the said first mortgage bonds and the said debenture bonds and paying off its floating debt, said Association should issue its consolidated mortgage bonds aggregating $1,600,000. It is agreed in said Trust Deed that the bonds secured thereby shall be issued only for the purpose of retiring the outstanding first mortgage and debenture bonds and the payment of said floating debt, and that so long as any of said first mortgage or debenture
340 bonds shall remain outstanding a corresponding amount of bonds in the issue thereby secured shall remain unsold and be issued only in exchange for the existing bonds; that 1,397 of the new bonds shall be issued only in exchange for and on surrender of corresponding amounts of the first mortgage and debenture bonds. The remaining 203 bonds shall be delivered to the Chicago Auditorium Association for the purpose of paying off its floating indebtedness. Said trust deed further contains the following clause:

It Is Further Expressly Understood and Agreed that beginning on the First day of February 1902, and thenceforward until the maturity of the bonds hereby secured on the first day of February, 1942, the party of the first part will reserve and set apart in each year not less than the sum of Twenty thousand dollars ($20,000.00) as a sinking fund towards the redemption and payment of the bonds of this issue at their maturity, which sinking fund shall be invested either in the purchase and retirement of the bonds of this issue or in interest bearing securities approved by the party of the second part, and shall be faithfully applied towards the retirement and payment of the bonds of this issue, at or before the maturity thereof. Before proceeding to foreclose this deed or mortgage, the trustee shall have the right first to exact from the bondholders reasonable indemnity against loss or liability that may be incurred by it in so doing, and upon the tender by the bondholders, or any of them, of such reasonable indemnity, whether previously requested of them or not, and upon the written request of a majority in interest of all the holders of all of said bonds then unpaid or not redeemed, it shall be the duty of the trustee in case of any default continuing on the part of the party of the first part and not waived as hereinafter provided, to foreclose the lien hereby created in such lawful manner as the trustee may deem best.

The witness, Stephen G. Morse, testified as follows: Am

Assistant Secretary of the Trust Department of Illinois Merchants Trust Company, formerly Illinois Trust & Savings Bank, and the two trust deeds, Plaintiff's Exhibits
341 20 and 21, are in my custody. Under Exhibit 20, dated February 1, 1889, there are outstanding 535 bonds for $1,000 each and 598 bonds for $500 each, a total of $834,000 par value. Under Exhibit 21, dated February 1, 1892, there have been issued altogether bonds in the amount of $766,000 par value, of which $225,000 have been retired, leaving $541,000 still outstanding. The bonds issued and outstanding under these two trust deeds are held in widely scattered ownership. We mailed notices of this litigation to the names and addresses of all the holders of these bonds known to us, about 355 in all. The document shown me is a copy of the notices so mailed on November 1, 1924.

Said document was offered and received in evidence as—

Plaintiff's Exhibit 22. Notice dated November 1, 1924 to holds of bonds of Chicago Auditorium Association dated February 1, 1889, and February 1, 1892. Said notice is signed by Illinois Merchants Trust Company, Trustee, and recites the pendency of this suit in the District Court of the United States; that Illinois Merchants Trust Company as successor to Illinois Trust & Savings Bank declined to represent the bondholders in said litigation; that Chicago Auditorium Association amended its bill by making certain named bondholders parties defendant as representing the entire class of bondholders; and holders of said bonds are notified that
342 they are at liberty to appear and be represented by independent counsel.

The witness thereupon produced a certain other deed of trust, which was offered and received in evidence on behalf of Plaintiff as—

Plaintiff's Exhibit 23. Trust Deed from The Corporation of the Fine Arts Building to Illinois Trust & Savings Bank dated March 5, 1903, and recorded in the office of the Recorder of Cook County, Illinois, April 28, 1903, in book 8241 of records, at page 43, as document No. 3,382,697 securing 1,000 bonds of The Corporation of the Fine Arts Building for $1,000 each, aggregating $1,000,000 per value, with interest, and due upon various dates up to and including March 1, 1933. Said Trust Deed conveys the same premises that were demised by the two leases hereinabove described from Studebaker Brothers Manufacturing Company to Chicago Auditorium Association, Plaintiff's Exhibits 16 and 17.

The witness: There are $560,000 par value of these bonds now outstanding. I sent out on November 1, 1924, to the names and addresses of the holders of all such bonds known to me a notice of which the document now shown me is a true copy. Said document was offered and received in evidence as—

Plaintiff's Exhibit 24. Notice dated November 1, 1924, signed by Illinois Merchants Trust Company, Trustee,
343 and addressed to holders of bonds of The Corporation of the Fine Arts Building, dated March 5, 1903, reciting the pendency of this proceeding, the refusal of Illinois Merchants Trust Company to represent the bondholders under said Trust Deed, and the amendment of the bill of complaint making certain named bondholders parties defendant as representing the entire class; and notifying such bondholders that they are at liberty to appear and be represented by independent counsel.

Cross-Examination by Mr. Cooper.

Of the bonds secured by Plaintiff's Exhibit 21, there have been retired $225,000 par value. I have a memorandum that they were cancelled in 1909 and 1910. I am pretty sure that none of them have been retired in the last few years.

JOHN H. C. TEMPLETON, a witness for Plaintiff, testified:

I am Assistant Cashier of the First Trust & Savings Bank, which acts as fiscal agent in payment of the interest coupons and bonds under the Trust Deed from The Corporation of the Fine Arts Building to Illinois Trust & Savings Bank, now Illinois Merchants Trust Company. I prepared a list of bondholders under that Trust Deed for the purpose of mailing notices of this pending litigation including therein all names of such bondholders, 31 in all, known to me or to my
344 Bank. The First Trust & Savings Bank owns $312,000 par value of these bonds and did own $329,000 when its answer was filed in this cause. We furnished to The Corporation of the Fine Arts Building a list of the names and addresses known to us .

Mr. Harry R. Hurlbut, counsel for certain defendants, here stated in answer to a question that he received the list referred to by Mr. Templeton and turned it over to Mr. Lundgren of the office of Fisher, Boyden, Kales & Bell.

FREDERICK C. E. LUNDGREN, a witness on behalf of the Plaintiff testified as follows:

I am employed in the office of Fisher, Boyden, Kales & Bell. I received from Mr. Hurlbut the list of bondholders just referred to by Mr. Templeton and mailed on or about November 1, 1924, to all the names and addresses on the list, copies of the notice in evidence as Plaintiff's Exhibit 24. I also mailed copies of Plaintiff's Exhibit 22 to the bondholders under the Trust Deeds referred to therein. These notices were mailed by me in connection with the Illinois Merchants Trust Company.

The following documents were offered and received in evidence on behalf of the plaintiff.

345 Plaintiff's Exhibit 25. Certified copy of last will and testament of Henry J. Willing and codicils thereto admitted to probate January 5, 1904, in the Probate Court of Cook County, Illinois, devising and bequeathing all of testator's estate, except his residence and the contents thereof, to Frances Skinner Willing, Mark Skinner Willing and Ambrose C. Cramer, as Trustees for the purposes set out in said will and codicils, and appointed them executors of said will. It is provided in said will that in case of the death or resignation of any two of said three trustees, The Northern Trust Company shall become trustee with the remaining original trustee.

Plaintiff's Exhibit 26. Certified copy of letters testamentary granted January 5, 1904 to Ambrose Cramer and Mark Skinner Willing, as executors of the last will and testament of Henry J. Willing, deceased.

MARK SKINNER WILLING, a witness on behalf of the Plaintiff testified as follows:

Henry J. Willing, deceased, was my father. His children and descendants were my sister, Evelyn Pierrepont Willing and myself. My living children are Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr., who are the only children I ever had except one daughter who died at the age of about 5 years. My three children above
346 named are my only descendants, and none of them have children of their own.

The following documents were offered and received in evidence on behalf of plaintiff for the purpose of establishing the ownership of and interests in the Peck property as set forth in paragraph 7 of the bill of complaint and in the supplement to said bill of complaint filed April 25, 1924.

Plaintiff's Exhibit 27. Certified copy of an exemplification of the will and codicils of William A. Slater, deceased, admitted to probate in the Supreme Court of the District of Columbia, March 13, 1919, which exemplified copy was filed for record in the Probate Court of Cook County, Illinois, July 27, 1919.

Plaintiff's Exhibit 28. Certified copy of deed of trust from Elizabeth Sears to Herbert M. Sears dated March 3, 1913, and recorded in the Recorder's Office of Cook County, Illinois, April 3, 1913, in book 12,347 of records, at page 94, as document No. 5,156,779.

Plaintiff's Exhibit 29. Certified copy of instrument executed by Elizabeth Sears Warren dated June 1, 1920 and recorded in said Recorder's Office September 16, 1920, in book 16,274 of records, at page 214, as document No. 6,941,122, purporting to amend said deed of trust.

347 Plaintiff's Exhibit 30. Certified copy of deed of trust from Phyllis Sears to Herbert M. Sears dated April 4, 1916 and recorded in said Recorder's Office April 17, 1916, in book 13,844 of records, at page 479, as document No. 5,846,740.

Plaintiff's Exhibit 31. Certified copy of instrument executed by Phyllis Sears Tuckerman dated June 1, 1920, and recorded in said Recorder's Office September 16, 1920, in book 16,311 of records, at page 69, as document No. 6,941,124, purporting to amend said deed of trust.

Watson Washburn, a witness for plaintiff, also testified with reference to the relationship of said parties.

For the purpose of establishing the ownership of the so-called Studebaker property and the interests therein as set forth in paragraph 8 of the bill of complaint and in the supplement thereto, there was offered and received in evidence in behalf of the Plaintiff the following document.

Plaintiff's Exhibit 32. Certified copy of the last will and testament of Charles A. Chapin, deceased, and codicils thereto, admitted to probate in the Probate Court of Cook County, Illinois, October 30, 1913.

348 HARRY R. HURLBUT, a witness for Plaintiff, also testified with reference to the relationships of the defendants mentioned in said paragraph 8 of the bill of complaint as amended and the supplement thereto.

EDWIN A. SEIPP, a witness on behalf of the Plaintiff, testified as follows:

I own three of the bonds secured by the first mortgage of the Chicago Auditorium Association, dated February 1, 1889 for $500 each, and three of the bonds secured by the second mortgage dated February 1, 1892 for $100 each. My brothers William C. Seipp and Clarence T. Seipp each own $3,000 of the bonds secured by the second mortgage. These bonds were inherited from the estate of my father, William C. Seipp, who, I think, bought them at the time of their issue.

LEWIS L. McARTHUR, a witness on behalf of the Plaintiff, testified as follows:

I am Assistant Secretary of The Northern Trust Company. Caroline P. McCready owns $3,000 of the first mortgage bonds of the Chicago Auditorium Association, and The Northern Trust Company, Trustee under the will of Mary E. Shields, owns $1,500 of the same bonds. The Northern Trust Company as Trustee under the will of Edward W. McCready
349 also owns $3,000 of them. Charles S. Dewey owns $6,000 of the second mortgage bonds of the Chicago Auditorium Association. These are in the possession of The Northern Trust Company, which, as Trustee under the will of Abele C. Stone, also owns $5,000 of said second mortgage bonds. We also have in our custody one of the bonds of The Corporation of the Fine Arts Building for $1,000 owned by George Higginson, Jr.

Mr. Fisher stated that one of the defendants, Albert W. Harris, had recently disposed of the bonds held by him under the Trust Deed of The Corporation of the Fine Arts Building and suggested that the bill should be dismissed as to him. Mr. Gordon, appearing for Albert W. Harris, concurred in the suggestion.

EDWARD H. TAYLOR, a witness on behalf of the Plaintiff, testified as follows:

Direct Examination.

I am president of the Flick Construction Company and lived in Evanston from 1870 to 1890. My father was Secretary of Lincoln Park and I often drove into Chicago with him. We left our horses at a livery stable on Michigan Avenue between Jackson and Adams Streets. I had occasion to notice property conditions on Michigan and Wabash Avenues near the present site of the Auditorium Building. I learned to swim at a natatorium at the corner of Jackson Street and Michigan Avenue and used to go in the early 80s to a roller skating rink at Congress and Michigan where the Audi-
350 torium now stands. I was connected with the Republican National Committee which held their convention in 1884 in the old Exposition Building on the east side of Michigan Avenue, about where the Art Institute now stands at the end of Adams Street. I was also connected with the Republican National Convention held in 1888 in the Auditorium Theater which was not then entirely completed. During 5 or 6 years before the construction of the Auditorium the only buildings of any consequence on Michigan Avenue in the vicinity were the Pullman Building and the old Art Institute, now the Chicago Club at the Southwest corner of Van Buren and Michigan. At Madison Street there was a ramshackle brick building afterwards occupied by Montgomery Ward. Towards Randolph Street the buildings were very mediocre, saloons and two story frame buildings. The Beaurivage Apartment was built about the same time as the Auditorium. The Argyle was an apartment building which degenerated and was torn down to make way for the Railway Exchange Building. Going south on Michigan Avenue from Congress Street there was an old fashioned brick house at the corner of Congress, set a little back, with an iron fence around it. From there down to the next street there was a row of houses formerly occupied as residences, but turned into boarding houses. One winter we lived at a boarding house about the middle of that block.
From where the Blackstone now stands, a row of resi-
351 dences ran towards 12th Street. Coming the other way there was the Brunswick Roller Skating Rink on the side of the Auditorium property, a one story affair with a sloping

roof. Then came the Studebaker Building, now known as the Fine Arts Building erected about the same time as the Auditorium. Beyond this was the Chicago Club and the Beaurivage Apartments, the Kadish Natatorium and Leroy Payne's Livery Stable. The old Leland Hotel was at the corner of Jackson, and the building afterwards occupied by Montgomery Ward at Madison Street. Between Washington and Randolph, where the Public Library now stands, the property was vacant. On Congress Street towards Wabash Avenue was the roller skating rink and then two brick residences, all on the present Auditorium site. The residences ran all the way along Congress Street. On the east side of Michigan Avenue, between Randolph and Madison, was the Chicago Baseball Park, and then between Madison and Jackson came Battery D, and the Armory, and the Exposition Building. Then the property was clear down to Park Row or Fifth Street. At that time the water came up to the Illinois Central tracks west of which to Michigan Avenue was a width of perhaps 300 feet. The Argyle was a 6 story hotel or office building which degenerated into a disreputable place along about 1888 or 1890. Where the Public Library stands there was vacant ground on which boys used to play baseball. South of the ball park on Michigan Avenue came Battery D and the fire engine house, a little later, and the Armory. I had
352 less occasion to go over to Wabash Avenue. There was a famous beer garden just south of the corner of Wabash and Congress, and on Congress Street west of Wabash Avenue there were residences which had degenerated into a red light district where there were well known disorderly houses. In both directions from the beer garden there were cheap transient hotels, more or less disreputable. The photograph now shown me represents with substantial accuracy the condition of the Auditorium Building and the immediate surroundings at the time when the building was almost finished.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 33 and is certified herewith as a part of the record.)

The other photograph now shown me represents conditions immediately following the completion of the Auditorium Building.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 34 and is certified herewith as a part of the record.)

This photograph is taken from the southwest corner of

Congress Street and Wabash Avenue. It shows that the southwest corner of Wabash Avenue and Congress Street was vacant, and that immediately next to it was one of the residences to which I have referred. It also shows the general building conditions north of the Auditorium Building on Wabash Avenue on the east side of the street.

353 *Cross-Examination.*

I was born January 13, 1869. The Auditorium Building was sufficiently completed in 1888 to hold the convention there. The roof was on but it had not been finished in the theater. I was 19 years old at the time of this 1888 convention. My father was John A. Logan's secretary and I was his office boy. Michigan Avenue was then paved with Macadam, what I would call today a poor grade of Macadam road. There were more business houses on Wabash Avenue than on Michigan Avenue and south of Randolph Street. I should say that Wabash Avenue was a more important business street than Michigan Avenue by far. There was no elevated railroad but horse cars ran on Wabash Avenue. The cable was put in about 1884 or 1885. One street car line came down and turned in front of the Exposition Building, but there were no car lines on Michigan Avenue running north and south. Wabash Avenue was not the most important business street in the City. State Street, which parallels Wabash one block away, was the most important. State, Dearborn and Clark Streets were the three important streets with Wabash and Fifth Avenues further away. Lake front development started and business began to go east about the time the Auditorium was built. The Fine Arts Building was in process and was completed before the Auditorium was completed. The Fine Arts Building is shown on Plaintiff's Exhibit 33 immediately to the right of the Auditorium. It was completed before the Auditorium was completed. The building
354 next to it is the Chicago Club. Then the Art Institute. It was completed before either of the other two. The Pullman Building at Adams and Michigan and another building shown on the photograph are the only two that are there today. The Pullman Building is 9 stories high of brick and stone and is still in use by the Pullman Company and other tenants. The Fine Arts Building is a very high class artists building. The character of the tenancy has changed materially in the last ten years. When it was put up it was a

general office building with a few artists and musicians in it and two theaters, the Studebaker and the Playhouse. The same two theaters are there though the names may have changed. The building I have described as the old Art Institute is now the Chicago Club. All of these buildings were completed before the Auditorium was finished. On Wabash Avenue the building shown on the photograph immediately north of the Auditorium was there before the Auditorium was erected. It is a 6 story brick building with some stone. It has been there many years, but I do not remember whether it was there before the Auditorium. The Building at the southeast corner of Van Buren and Wabash is a very old one; it was a hotel when I was a small boy. It was occupied as a hotel right after the fire. None of the buildings ante-date 1871. The Leland Hotel was on the present site of the Strauss Building at Michigan and Jackson. It was a good hotel in its day, but not very much of a hotel from 1886 to 1889.
355 The Richelieu and Victoria Hotels were in that neighborhood. The Richelieu was next to the Beaurivage Apartments, an old ramshackle building. The Argyle was across Adams Street from the Pullman Building where the present building of the Peoples Gas Light & Coke Company is. It degenerated into an assignation house. It was of brick or stone and brick with an elevator. I think it was 6 stories high, not as high as the Pullman Building.

FRED J. BUCHAL, a witness on behalf of Plaintiff, testified as follows:

I am secretary to Columbus Healy who owns one of the bonds of The Corporation of the Fine Arts Building issued under the trust deed dated March 5, 1903, and recorded as document No. 3,382,697.

MORRIS L. GREELEY, a witness on behalf of the Plaintiff, testified as follows:

Direct Examination.

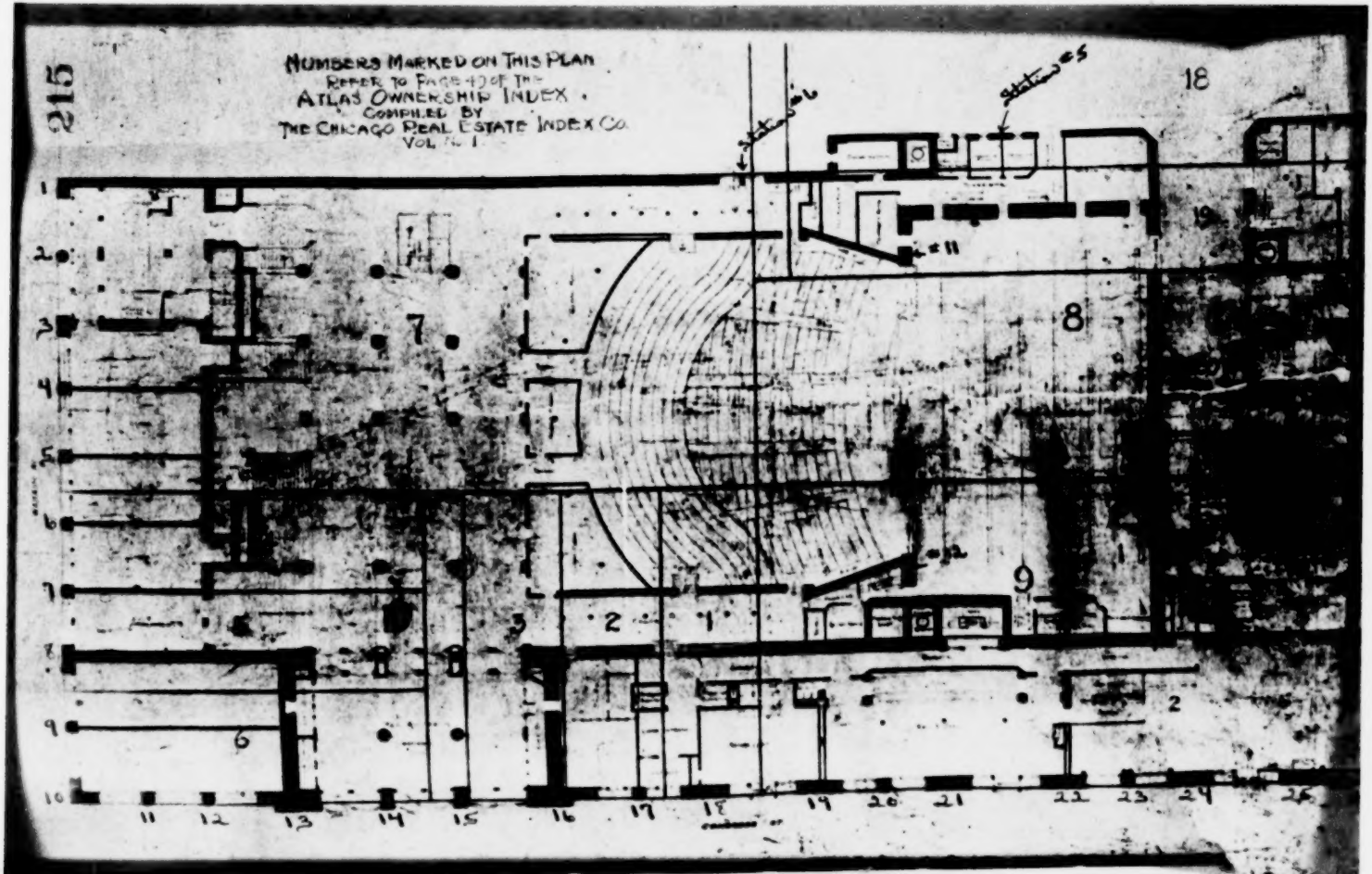
I live at Winnetka, Illinois, and am a land surveyor. I have been in that occupation since 1886, principally in Cook County, associated with the Greeley-Carlson Company, suc-

ceeled by Greeley, Howard & Company, and then by the Greeley-Howard-Norlin Company. I have done work in connection with the Auditorium Building, first in the summer of 1886. I was given the lines and levels for the construction of the piers and walls prior to and during construction
356 of the work. The foundation was partly excavated when I was working there. The soil in that excavation was for the most part dry except when muddied by rain or the hose for mixing concrete. The substance of it was rather clay; there might have been some filling at places. From then down to the present time, we have continued to take levels on certain of the piers, on the exterior walls, and one or two of the interior walls, almost every year since the structure was completed. The last time we took levels in that building was in 1924 when I think we covered most of the piers upon which we had taken levels before; one or two might have been covered up so that we could not get our points. We have taken levels at the same points during the entire period from completion of the building down to 1924, except in places where the point for taking the level has been obstructed or covered over. The document now shown me is a blueprint showing the property on which the Chicago Auditorium Building is located. It shows the lot lines and dimensions and the lot numbers.

(Plat offered and received in evidence as Plaintiff's Exhibit 35, being the same as Exhibit 1 attached to the original bill of complaint).

The document now shown me is a photostat of the plan of the Auditorium showing the basement piers and walls. There is also outlined upon it the location of the Auditorium itself and certain other parts of the building. It is a correct plan of the things it purports to show. The red figures
357 from 1 to 34 upon the exterior walls indicate the numbers of the piers on which we leveled.

(Plat offered and received in evidence as Plaintiff's Exhibit 36, as follows:)


215
NUMBERS MARKED ON THIS PLAN
REFER TO PAGE 40 OF THE
ATLAS OWNERSHIP INDEX
COMPILED BY
THE CHICAGO REAL ESTATE INDEX CO.
VOL. NO. 1
18
Station 6
Station 5
7
8
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6
2
1
11
12
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14
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359 There are two stations on Exhibit 36, one marked No. 5 and the other marked No. 6. No. 5 is on the iron window frame, just east of the stage entrance of the Auditorium. No. 6 is a mark on the iron frame of the alley entrance to the Auditorium proper. The marks 11 and 12 in the interior of the building are at the proscenium piers. The stations 5 and 6, to which I have referred, are indicated in ink outside of the walls, and the Nos. 5 and 6 shown inside are merely the lot numbers. I recall to some extent the foundations put into the building, particularly under the tower. There were iron rails set in parallel rows and secured with concrete and then the next row at right angles to that row and again secured or filled with concrete. I think there were heavy timbers underlying the whole. It was all one solid mass under the entire tower and extending somewhat beyond the tower, I should say approximately three or four feet. I think it projected on all sides and about the same distance towards the sidewalks as towards the interior of the building. My best recollection about the foundations under the interior columns is that each pier had its own foundation of concrete. I am not positive about that and I am not certain whether rails were put there, but I think not. The foundation of the tower was loaded with pig iron. I was told at the time that the load of pig iron was equivalent to the total weight
360 of the superstructure to be erected on it. This was before they commenced building the tower and as the superstructure went up they took off a corresponding amount of pig iron sufficient to equalize the load. At the time the Auditorium Building was being constructed, the Studebaker Building was immediately north of it and then at the corner of Van Buren Street the Art Institute Building, now the Chicago Club. Across the street, I think was the Victoria Hotel, and a little farther along Leroy Payne's livery stable, a one story frame building occupying, I suppose, about 80 feet. South of the Auditorium Building on Michigan Avenue were residences, mostly boarding houses or small hotels consisting of stone and brick buildings of two or three stories, and extending a number of blocks south. The document now shown me is a blueprint of a survey made by my company showing the property covered by the Auditorium Building with the names of the owners of certain of the leaseholds and the areas of their holdings. It gives the dimensions and figures showing the number of square feet in the different parcels.

(Plat offered in evidence and marked for identification Plaintiff's Exhibit 37.)

I have prepared a table or statement showing the different levels taken by me or under my direction during the years that levels on the property were taken by one or the other of my companies. I have given a copy of the table to counsel on the other side. The document now handed me is the
361 one to which I refer and it directly represents the levels of the various points covered by the statement at the dates given therein.

(Document offered in evidence and marked for identification Plaintiff's Exhibit 38.)

In the first column appear the numbers of the piers 1 to 34 and stations, 5, 6, 11 and 12. In the succeeding columns are the elevations taken at the dates indicated in feet and decimals of a foot above Chicago datum. Where there are blank spaces and no figures, we were unable to get an elevation on the column or station on the date indicated. Pier No. 1 is at the northwest corner of the Building. The figures shown in August, 1887 are the original elevations of the tops of the stone caps of the piers before any load was placed on them. The next date was August, 1888, just a year later, at which time I think the Building as a structure was completed. There may have been some change in the interior occupational load as the finish was probably not all in. Reading across the statement from left to right as to pier No. 1, we get the level of the pier at the date indicated at the top of the statement showing, for instance, the level of pier No. 1 to be 15.40 in August, 1887, and 15.15 in August, 1888, and 14.03 in September, 1923, under the next to the last column on the right. This would indicate that at that particular point the Building had settled the difference be-
362 tween 14.03 and 15.40 or 1.37 feet, about 1 foot 4½ inches.

The statement indicates that the greatest settlement occurred at the piers under the tower Nos. 13 and 16. The last levels taken by us were in 1924, I think in October. The total settlement of pier No. 13 would be 2.30 feet, about 2 feet 3½ inches. The other pier at which the greatest settlement occurred was No. 16. The settlement at that point was 2.23 feet. The table shows where according to our levels the settlement has continued between September, 1923 and October, 1924, and where the levels have remained the same. There is no point where the levels show an increase of elevation at any time during the entire period. The level of station

5, shown in August 1887, was 21.56 feet above city datum and in September 1923, 19.95 feet. At station 11 the level was 12.26 feet in August, 1887, and 10.61 feet in September, 1923. The photostat of the Building, Plaintiff's Exhibit 36, I would say was the foundation plans of the Building. It shows the location of the Auditorium Theater proper and its appurtenances with reference to the ground covered by the five separate leaseholds. The Theater proper extends over all of those leaseholds except lot 18 known as the first Studebaker leasehold, and the dressing rooms and property rooms of the Theater extending over on that lot.

(The Document marked as above, Plaintiff's Exhibit 38 for identification, was offered and received in evidence as Plaintiff's Exhibit 38 and was in words and figures as fol-
364 lows:)

May 14, 1925

Hamlin, Topliff & Cooper,
1501-105 S. La Salle St.,
Chicago, Ill.

Gentlemen:

Herewith is a compilation of our reports of levels taken on the piers and stations of the Auditorium Building for the years 1887 to 1924. Figures are elevations of the top of the stone cap of the piers above City Datum. Stations 5 and 6 are marks on the North wall of the Auditorium Building, and stations 11 and 12 are the top of the stone cap of the proscenium piers.

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PIER NO	AUG. 1887	AUG. 1888	JAN. 1889	JULY 1889	JAN. 1890	JUNE 1890	JAN. 1891	JUNE 1891	JAN. 1892	JULY 1892	JAN. 1893	AUG. 1893	MARCH 1894	JAN. 1895	JULY 1895	MARCH 1896	JULY 1896
1	15.40	15.15	14.93	14.89	14.80	14.73	14.68	14.65	14.62	14.56	14.52	14.51	14.49	14.46	14.43	14.40	14.39
3	15.37	15.23	15.06	14.93	14.83	14.73	14.68	14.65	14.68	14.55	14.60	14.46	14.45	14.39	14.39	14.34	14.32
4	15.37	15.26	15.10	14.96	14.85	14.76	14.69	14.66	14.61	14.56	14.51	14.48	14.45	14.41	14.38	14.35	14.33
5	15.35	15.25	15.06	14.90	14.79	14.69	14.63	14.58	14.53	14.49	14.43	14.39	14.37	14.32	14.28	14.26	14.24
6	15.37	15.24		14.89	14.76	14.68	14.60	14.54	14.47	14.43	14.37	14.34	14.31	14.26	14.23	14.20	14.18
7	15.38	15.25	15.02	14.84	14.69	14.57	14.52	14.42	14.37	14.30	14.22	14.20	14.17	14.11	14.07	14.05	14.03
8	15.38	15.21	14.96	14.75	14.60	14.45	14.37	14.28	14.19	14.13	14.05	14.01	13.99	13.96	13.88	13.83	13.81
9	15.41	15.27	15.00	14.73	14.57	14.4	14.33	14.22	14.15	14.08	13.99	13.93	13.90	13.83	13.79	13.75	13.73
10	15.38	15.26	14.93	14.65	14.41	14.32	14.22	14.11	14.06	13.95	13.89	13.81	13.79	13.7	13.66	13.65	13.61
11	15.42	15.32	15.01	14.76	14.53	14.44	14.23	14.22	14.16	14.08	14.04	13.94	13.90	13.85	13.79	13.75	13.74
12	15.39	15.28	14.99	14.76	14.54	14.27	14.16	14.06	14.00	13.92	13.89	13.78	13.74	13.69	13.63	13.61	13.57
13	15.37	15.25	14.94	14.63	14.52	14.36	14.28	14.12	14.07	13.96	13.94	13.85	13.80	13.74	13.67	13.64	13.64
16	15.45	15.22	15.02	14.77	14.55	14.4	14.29	14.20	14.11	14.11	14.04	13.93	13.90	13.86	13.78	13.76	13.76
17	15.39																
18	15.38	15.32	15.06	14.81	14.59												
19	15.39	15.34	15.08	14.87	14.64	14.52	14.38	14.35	14.32	14.25	14.20	14.16	14.15	14.1	14.07	14.01	14.01
20	15.39	15.34															
21	15.39	15.34	15.14	14.94	14.74	14.62	14.53	14.46	14.43	14.36	14.31	14.29	14.27	14.23	14.19	14.14	14.14
22	15.39	15.34	15.16	14.96	14.76	14.62	14.52	14.50	14.47	14.41	14.31	14.31	14.30	14.28	14.23	14.20	14.20
24	15.38	15.34	15.19	14.96	14.80	14.68	14.58	14.53	14.51	14.45	14.42	14.40	14.36	14.35	14.30	14.26	14.26
25	15.37	15.34	15.19	14.93	14.81	14.71	14.62	14.56	14.50	14.48	14.44	14.44	14.40	14.37	14.33	14.29	14.30
26	15.38	15.32															
27	15.39	15.30	15.10	14.90	14.71	14.64	14.54	14.48	14.34		14.32	14.32	14.31	14.29	14.25	14.20	14.19
29	15.40	15.35	15.18	14.90	14.71	14.63	14.54	14.48	14.40		14.42	14.37	14.36	14.33	14.29	14.24	14.25
30	15.39	15.35	15.07	14.83													
31	15.40	15.35	15.07	14.84	14.68	14.58	14.51	14.48	14.44		14.39	14.32	14.30	14.29	14.25	14.24	
32	15.41	15.37	15.05	14.85	14.71	14.57	14.54	14.49	14.45	14.45	14.39	14.25	14.33	14.3	14.27	14.22	14.22
34	15.38	15.27	15.06	14.86	14.69	14.61	14.53	14.49	14.45	14.44	14.41	14.35	14.30	14.30			
Station																	
5	21.56	21.40		20.90	20.86												
6	21.56	21.38	21.29	21.07	21.04	20.96	20.90	20.82									
11	12.26	12.09	11.96	11.69	11.47	11.33	11.34	11.28	11.29	11.23	11.23	11.21	11.12	11.12	11.09	11.08	11.04
12	12.20	12.00	11.82	11.50	11.35	11.14	11.03	11.05	11.01	10.89	10.89	10.89	10.85	10.82	10.77	10.74	10.74

PER NO	Jan 1897	July 1897	May 1900	July 1901	Aug 1902	Aug 1904	Aug 1907	May 1908	Aug 1912	April 1915	
1	14.36	14.36	14.25	14.24	14.22	14.21	14.17	14.13	14.16	14.16	14
3	14.32	14.29	14.20	14.17	14.15	14.14	14.12	14.12	14.09	14.08	14
4	14.33	14.31	14.22	14.19	14.16	14.14	14.07	14.11	14.03	14.07	14
5	14.29	14.20	14.14	14.12	14.09	14.07	14.03	14.03	14.00	13.98	13
6	14.18	14.16	14.04	14.01	13.97	13.96	13.88		13.89	13.84	13
7	14.01	13.99	13.92	13.90	13.88	13.84	13.78	13.77	13.74	13.74	13
8	13.79	13.78	13.65	13.63	13.61	13.58	13.51	13.49	13.47	13.46	13
9	13.71	13.68									
10	13.58	13.56	13.44	13.42	13.39	13.32	13.24	13.23	13.21		13
11	13.72	13.67	13.58	13.53	13.51	13.47	13.37	13.37	13.35	13.33	13
12	13.56	13.51	13.43	13.37	13.34	13.31	13.23	13.22	13.19	13.15	13
13	13.61	13.57	13.49	13.48	13.41	13.37	13.32	13.30	13.25	13.21	13
16	13.74	13.72	13.63	13.60	13.57	13.52	13.48	13.44	13.38	13.32	13
18				13.79	13.75	13.70	13.66	13.64	13.64	13.62	13
19	14.01	13.98	13.91	13.87	13.86	13.81	13.75	13.75	13.75	13.75	13
21	14.14	14.11		14.04	13.97	13.92	13.90	13.87	13.87	13.87	13
22	14.20	14.16		14.07	14.05	14.04	14.00	13.95	13.95	13.95	13
24	14.26	14.22		14.14	14.14	14.10	14.09	14.05	14.05	14.05	14
25	14.28	14.25		14.19	14.17	14.13	14.10	14.07	14.07	14.07	14
27	14.15	14.13		14.05	14.02	14.03	14.01	13.98	13.98	13.98	13
29	14.23	14.20		14.09	14.09	14.06	14.09	14.01	14.01	14.01	13
				14.05	14.00	13.97	13.96	13.92	13.92	13.92	13
31				14.07	14.04	14.03	14.00	13.97	13.97	13.97	13
32	14.23	14.19		14.07	14.04	14.03	14.00	13.97	13.97	13.97	13
34				14.02	13.98	13.94	13.91	13.86	13.85	13.85	13
Fishers											
5			20.25	20.23	20.17	20.18	20.14	20.10	21.10	20.10	20
6			20.52	20.48	20.43	20.44	20.43	20.40	21.40		
11	10.98	11.01	10.91	10.89	10.87	10.82	10.71	10.77	10.73	10.73	10
12	10.73	10.68	10.62	10.60	10.59	10.51	10.55	10.51	10.48	10.47	10

May 14, 1925

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compilation of our reports of levels
stations of the Auditorium Building for
. Figures are elevations of the top of
iers above City Datum. Stations 5 and 6
wall of the Auditorium Building, and
the top of the stone cap of the proscenium

.....

Jan 1890	June 1890	Jan 92	June 92	Jan 93	June 93	Jan 1900	Aug 1923	March 1924	Jan 1925	July 1925	March 1926	July 1926
.80	14.73	14.68	14.65	14.62	14.56	14.52	14.51	14.49	14.46	14.43	14.40	14.39
.83	14.73	14.68	14.65	14.58	14.55	14.50	14.46	14.45	14.39	14.39	14.34	14.32
.85	14.76	14.69	14.66	14.61	14.56	14.51	14.48	14.45	14.41	14.38	14.35	14.33
.79	14.69	14.63	14.58	14.53	14.49	14.43	14.39	14.37	14.32	14.28	14.26	14.24
.76	14.68	14.60	14.54	14.47	14.43	14.37	14.34	14.31	14.26	14.23	14.20	14.18
.69	14.57	14.52	14.42	14.37	14.30	14.22	14.20	14.17	14.1	14.07	14.05	14.03
.60	14.45	14.37	14.28	14.19	14.13	14.05	14.01	13.99	13.96	13.88	13.83	13.81
.57	14.4	14.33	14.22	14.15	14.08	13.99	13.93	13.90	13.83	13.79	13.75	13.73
.41	14.32	14.22	14.11	14.06	13.95	13.89	13.81	13.79	13.7	13.66	13.65	13.61
.59	14.44	14.23	14.22	14.16	14.08	14.04	13.94	13.90	13.85	13.79	13.75	13.74
.54	14.27	14.16	14.06	14.00	13.92	13.89	13.78	13.74	13.69	13.63	13.61	13.57
.52	14.34	14.28	14.12	14.07	13.96	13.94	13.85	13.80	13.74	13.67	13.64	13.64
.55	14.4	14.29	14.20	14.11	14.11	14.04	13.93	13.90	13.86	13.78	13.76	13.76
.59												
.64	14.52	14.38	14.35	14.32	14.25	14.20	14.16	14.15	14.1	14.07	14.01	14.01
.74	14.62	14.53	14.46	14.43	14.36	14.31	14.29	14.27	14.23	14.19	14.14	14.14
.76	14.62	14.52	14.50	14.47	14.41	14.31	14.31	14.30	14.28	14.23	14.20	14.20
.80	14.68	14.58	14.53	14.51	14.45	14.42	14.40	14.36	14.35	14.30	14.26	14.26
.61	14.71	14.62	14.56	14.50	14.48	14.44	14.44	14.40	14.37	14.33	14.29	14.30
.71	14.64	14.54	14.48	14.34		14.32	14.32	14.31	14.29	14.25	14.20	14.19
.71	14.63	14.54	14.48	14.40		14.42	14.37	14.36	14.33	14.29	14.24	14.25
.68	14.58	14.51	14.48	14.44		14.39	14.32	14.30	14.29	14.26	14.24	
.71	14.57	14.54	14.49	14.45	14.45	14.39	14.25	14.33	14.3	14.27	14.22	14.22
.69	14.61	14.53	14.49	14.45	14.44	14.41	14.35	14.30	14.30			
20.86												
21.04	20.96	20.90	20.82									
11.47	11.33	11.34	11.28	11.29	11.23	11.23	11.21	11.12	11.12	11.09	11.08	11.04
11.35	11.14	11.03	11.05	11.01	10.89	10.89	10.89	10.85	10.82	10.77	10.74	10.74

PER NO	JAN 1897	JULY 1897	MAY 1900	JULY 1901	AUG 1902	AUG 1904	AUG 1907	MAY 1908	AUG 1912	APRIL 1915	APRIL 1917	APRIL 1918	MAY 1919	MAY 1921	SEPT 1923	1924
1	14.36	14.36	14.25	14.24	14.22	14.21	14.17	14.13	14.16	14.16	14.11	14.11	14.08	14.06	14.03	14.03
3	14.32	14.29	14.20	14.17	14.15	14.14	14.12	14.12	14.09	14.08	14.04	14.04	14.02	13.98	13.94	13.94
4	14.33	14.31	14.22	14.19	14.16	14.14	14.07	14.11	14.03	14.07	14.01	14.01	13.98	13.97	13.92	13.91
5	14.23	14.20	14.14	14.12	14.09	14.07	14.03	14.03	14.00	13.98	13.93	13.93	13.93	13.91	13.86	13.85
6	14.18	14.16	14.04	14.01	13.97	13.96	13.88		13.89	13.84	13.82	13.82	13.79	13.77	13.71	13.71
7	14.01	13.99	13.92	13.90	13.88	13.84	13.78	13.77	13.74	13.74	13.72	13.69	13.66	13.64	13.64	13.64
8	13.79	13.78	13.65	13.63	13.61	13.58	13.51	13.49	13.47	13.46	13.45	13.43	13.41	13.38	13.29	13.28
9	13.71	13.68														
10	13.58	13.56	13.44	13.42	13.39	13.32	13.24	13.23	13.21		13.15					13.06
11	13.72	13.67	13.58	13.53	13.51	13.47	13.39	13.37	13.35	13.33	13.30	13.28	13.26	13.22	13.19	13.19
12	13.56	13.51	13.43	13.37	13.34	13.31	13.23	13.22	13.19	13.15	13.13	13.12	13.09	13.06	13.02	13.02
13	13.61	13.57	13.49	13.43	13.41	13.37	13.32	13.30	13.25	13.21	13.19	13.19	13.16	13.14	13.09	13.07
16	13.74	13.72	13.63	13.60	13.57	13.52	13.48	13.44	13.38	13.32	13.29	13.22	13.21	13.29	13.23	13.22
18				13.79	13.75	13.76	13.66	13.64	13.64	13.62	13.60	13.59	13.56	13.54	13.53	13.49
19	14.01	13.98	13.91	13.87	13.86	13.81	13.75	13.75	13.75	13.75	13.72	13.71	13.68	13.67	13.62	13.60
21	14.14	14.11		14.04	13.97	13.92	13.90	13.87	13.87	13.87	13.84	13.84	13.81	13.79	13.75	13.74
22	14.20	14.16		14.07	14.05	14.04	14.00	13.95	13.95	13.95	13.92	13.91	13.89	13.86	13.80	13.81
24	14.26	14.22		14.14	14.14	14.10	14.09	14.05	14.05	14.05	14.02	14.01	13.99	13.96	13.92	13.91
25	14.28	14.25		14.19	14.17	14.13	14.10	14.07	14.07	14.07	14.05	14.04	14.02	13.99	13.95	13.94
27	14.15	14.13		14.05	14.02	14.03	14.01	13.98	13.98	13.98	13.94	13.94	13.91	13.89	13.85	13.84
29	14.23	14.20		14.09	14.09	14.06	14.03	14.01	14.01	14.01	13.96	13.96	13.93	13.90	13.89	13.89
				14.05	14.00	13.99	13.96	13.92	13.92	13.92	13.89	13.88	13.86	13.86	13.89	13.81
31				14.07	14.04	14.03	14.00	13.97	13.97	13.97	13.92	13.92	13.90	13.88	13.88	13.85
32	14.23	14.19		14.07	14.04	14.03	14.00	13.97	13.97	13.97	13.91	13.91	13.90	13.88	13.86	13.85
34				14.02	13.98	13.94	13.91	13.86	13.85	13.85	13.81	13.80	13.77	13.73	13.72	13.70
Pittsburg																
5			20.25	20.23	20.17	20.18	20.14	20.10	21.10	20.10	20.03	20.02	20.01	19.98	19.95	
6			20.52	20.48	20.43	20.44	20.43	20.40	21.40							
11	10.98	11.01	10.91	10.89	10.87	10.82	10.71	10.77	10.73	10.73	10.70	10.70	10.67	10.66	10.61	
12	10.73	10.68	10.62	10.60	10.59	10.51	10.55	10.51	10.48	10.47	10.46	10.46	10.43			

365 *Cross-Examination.*

I did not make the foundation plan offered as Plaintiff's Exhibit 36 and do not know who made it, or when it was made. The document now shown me purporting to be a copy of the plan has upon it a date of one of our surveys with the book and page of our notes. A plan substantially like this was in existence in 1886. By the term "datum" is meant a reference point or level established by the City of Chicago in 1848, which was the level of the lake in that year being the lowest level that has ever been reached. When I observed these foundations going in, my best recollection is that the excavation was about 12 or 13 feet below the sidewalk. That would not be below datum. A document marked for identification, Plaintiff's Exhibit 37, was prepared in my office. Mr. Case of Fisher, Boyden, Kales & Bell furnished me with the information which caused me to indicate portions of it as the first Studebaker leasehold, second Studebaker leasehold, first Walker leasehold, second Walker leasehold and Peck leasehold. The memorandum given by Mr. Case purported to be the legal descriptions of the properties and the figures showing the length of the lot lines were taken from our survey of the property. (Mr. Case in answer to a question stated that he took the descriptions from the leases.) The tabulations of levels are made with an ordinary surveyor's level.

The wind makes same difference and makes it more diffi-
366 cult to level. It sometimes makes a difference of one one-hundredth or perhaps two one-hundredths in the reading. The reading for pier No. 1 in 1907 is 14.17 and in 1908 is 14.19. This difference could be accounted for by the ordinary irregularity in running levels, that is the human element. In September 1923 and also in October 1924 the level for pier No. 1 is 14.03, which means that there was no deviation in the reading. As to pier No. 4, the reading of 13.92 in September 1923 and 13.91 in 1924 means that that was the best reading we could get in those two years. Ordinarily it is possible to measure as much as one one-hundredth of a foot with an ordinary surveyor's level. These levels on the piers were taken on marks cut into the pier, which were of rough hewn stone, and it was not always easy to hold right on the mark. We recorded the levels just as we found them, feeling that over a period of years they would correct themselves. We did not try to doctor them. A variation of three one-hundredths of a foot would be quite unusual. As to the

level of pier No. 4 shown as 14.07 in August 1907 and 14.11 in November 1908, the elevations were taken on top of the stone caps which were covered when the sidewalk was put in, and it was often difficult to find a place for leveling which would account for these variations. I have been accustomed to running levels in Chicago on foundations of this type. It is not unusual to find floating foundations settling.

367 These readings were made for the Chicago Auditorium Association and reported to them. I never discussed them with the officers or expressed apprehension to them about what the readings showed. I never discussed it with them at all. I know the heaviest settlement was in the first ten years.

(Plaintiff's Exhibit 37 for identification was received in evidence as Plaintiff's Exhibit 37, and is certified herewith as a part of the record.)

368 The Witness: The "human element" to which I referred might work either way, up or down. It would not ordinarily work the same way in observing the number of different levels at the same time. If my statement showed that from August 1907 to November 1908 the number of other levels besides point No. 1 had gone up, I would still say that the chances are the building had settled. If we got too high a reading at first from our starting bench, it would affect the readings on all the piers. If most of the levels showed a decrease and only four or five an increase, the cause would in my mind be mostly owing to the wind. That is a very windy corner and it was pretty difficult to keep the level steady. I think such cases were often due to some element of inaccuracy in observation. If we found there were piers which went up persistently for some little time we would look for some other cause. I have talked about that once with Mr. Sullivan, the architect, and he said that if there were heavily loaded piers on each side of one that did not carry much of a load, the pressure might force the middle pier up slightly. My observation as an engineer and surveyor would confirm that opinion. Between 1907 and 1908 the statement shows certain changes in the levels of the piers and stations. These observations of levels are as correct as we could make them.

369 Station No. 11 was the north proscenium pier inside of the organ chamber or controlling works. It was a difficult place to get at. It was on a wooden floor used as a dressing room. The minute you stepped on the floor, it threw the level off and the irregularities of the levels there

were probably due more to the difficulties of leveling than to any actual movement of the pier going up at that particular point. Where the statement shows an increase of levels, it is possible that it might indicate actual changes in the level rather than inaccuracy of observation.

Cross-Examination.

The bench mark we started from was established on the west side of Wabash Avenue about opposite the northwest corner of the Auditorium Building and our first level was run directly across the street, and from that point we worked around the building and then went inside for two of the stations.

A. N. REBORI, a witness on behalf of the Plaintiff, testified as follows:

I am an architect engaged in practice in Chicago 15 years. I was employed by the owners or managers of the Fine Arts Building and had occasion to keep track of the foundations for the purpose of ascertaining any possible danger of fracture. In that connection we kept one point on the Audi-
370 torium Building at approximately the intersection of the north wall of the Auditorium Building or Theater with a continuation of the west line of the Fine Arts Building property at the alley. If you continue the line at the rear of the Studebaker or Fine Arts Building you would approximately reach the point where that line runs north and south hitting the wall of the Auditorium. There is a north and south alley immediately west of the Fine Arts Building and it would be where the east line of that alley intersects the north line of the Auditorium. I did not take levels, but the Chapin estate on my advice employed a surveyor to furnish us with levels. We watched those points as a doctor would watch a thermometer to see a rise of temperature in the patient, but where a change of level occurs it is the duty of the architect or engineer to investigate that point and ascertain whether any fracture or failure has occurred which might injure the building or cause damage, or which might need to be repaired at once before danger occurs. It is a danger signal. That is all these levels are taken for. Mr. D. W.

A'Neals was the surveyor who took the levels and made the computations.

EDWIN C. SEARLES, a witness on behalf of the Plaintiff, testified as follows:

Direct Examination.

371 My occupation is mining. I have lived in Chicago off and on since 1884. At one time I lived on Michigan Avenue, I think in 1885, in a building still standing just south of the street south of the Blackstone Hotel. It is a three story and basement building where there used to be an art gallery. I lived there approximately two years and then went south of 13th Street on Michigan Avenue for about 18 months. After which I went to Oregon. During the years I lived on Michigan Avenue, the block south of Congress Street was occupied by buildings of 2 and 3 stories, many occupied by the owners at that time. There was a rooming house or two in that block and on the corner of Harrison Street there was Mrs. Boardman's large boarding house, then considered very fashionable. South of it were residences of well known people of Chicago. Where the Blackstone now stands was the Blackstone residence. North of Congress Street at the corner of Van Buren were the Victoria and Beaurivage Apartments. Then there was the Richelieu Hotel and at the corner of Jackson, the Leland Hotel, and further north the Leroy Payne Stables. On Congress Street where the Auditorium now stands there was, when I came to Chicago, a skating rink and I think part of the time there was a swimming pool. Across the street between the alley and Wabash Avenue were some residences with high steps. There were saloons on Wabash Avenue at different points and one corner of Congress Street. The majority of buildings
372 on Wabash Avenue within a few blocks north and south of Congress Street were old residences occupied as rooming and lodging houses of a cheap character.

Cross-Examination.

The Blackstone residence where the Hotel now stands was a good house and further south there were some good houses. This was about 1886 and 1887 that I am talking about. My

recollection is that when I left Chicago about 1888 or 1889 the building at Van Buren Street and Michigan Avenue, now the Chicago Club, and also the Studebaker Building were in the course of construction. I don't remember whether they were completed before or after the Auditorium. I lived near the Auditorium site and walked past it twice almost every day, but do not remember whether the Auditorium foundations had been dug and walls put up before I went to the Pacific Coast in 1888 or 1889.

R. FLOYD CLINCH, a witness on behalf of the Plaintiff, testified as follows:

I live in Hubbard Woods, Illinois, and first came to Chicago in July 1883. I am president of the Chicago Auditorium Association. I am also president of the Crerar Clinch Coal Company, president of the Traverse City State Bank, president of the Chamber of Commerce Safety Vaults Company, vice president of the Chicago Rapid Transit Company, vice president of the Chicago, North Shore & Milwaukee
373 Railroad, president of the Racine Crushed Stone Company, president of the Hannah & Lay Mercantile Company of Traverse City, Michigan, president of the Boardman River Electric Light & Power Company, and president of the Hannah & Lay Company of Traverse City. In 1883 when I came to Chicago I was a clerk employed by the Joliet Steel Company in the old Honore Building, corner of Adams and Dearborn Streets. I lived in a boarding house at 16 Eldridge Court about half way between Wabash and Michigan Avenues. I generally walked home down Michigan Avenue to Eldridge Court. I have been president of the Chicago Auditorium Association since 1907 and was elected a director about a year before that time. When I came here in 1883 Michigan Avenue was not the most prominent street in Chicago; in fact it was inferior to Wabash Avenue where the buildings were more of a business character than those on Michigan Avenue. There was then a skating rink at Congress Street and Michigan Avenue where the Auditorium now stands, just north of that there were a few buildings such as the Richelieu and Victoria Hotels and then the Leland Hotel. South of Congress Street there were dwelling and boarding houses principally 2 and 3 stories. There were houses of some well known people such as the Blackstone

place and the John B. Drake house, but beyond 3 or 4 permanent families it was composed of boarding houses.

374 The development on Michigan Avenue started after the Auditorium was built and after the Congress Hotel Annex on the opposite side of Congress Street was built a year or two later, and from then on the whole character of Michigan Avenue changed so that it is now the most prominent street in the City and becoming more so every day for shops, hotels and office buildings. The first part of the Congress Hotel was called the Auditorium Annex in the first year and afterwards several of the units were built and they have all been merged into one known as the Congress Hotel. Further south the Blackstone Hotel has been built and the Stevens Hotel is about to be constructed. North of the Auditorium there were a few buildings such as the Pullman Building and the Leland Hotel. Since then the Railway Exchange Building about 20 or 22 stories high has been erected at the northwest corner of Jackson Boulevard and Michigan Avenue. Next comes Orchestra Hall, then the Monroe Building, 18 or 20 stories high and across the way on the northwest corner of Monroe Street the University Club.

Mr. Cooper produced a photograph which he stated was taken in 1921 or 1922. Mr. Fisher said he was willing to assume it to be correct and that it might be introduced in evidence.

(Said photograph offered and received in evidence as Plaintiff's Exhibit 39 and is certified herewith as a part of the record.)

375 The Witness: The first building shown here is the Blackstone Hotel about 200 feet high, built I think 10 or 12 years ago. Then there are some small buildings and the next large one is the Harvester Building about 150 to 175 feet high, occupying perhaps 100 feet on Michigan Avenue. The next large building is the Congress Hotel covering pretty nearly the entire block about 170 feet high. Then comes the Auditorium Hotel 10 stories high, excluding the tower. Then there is the Fine Arts Building, the Chicago Club and the McCormick Building. The Railway Exchange is on the northwest corner of Jackson, I should say it is about 200 feet high and about 175 foot front. Orchestra Hall is not so high. The Monroe Building at the southwest corner of Monroe Street is, I should judge, about 175 feet or 180 feet high, with a Michigan Avenue frontage of about

160 to 170 feet, then comes the University Club about 175 feet or 180 feet high, fronting about 150 feet on Michigan Avenue.

(Witness temporarily excused.)

DUDLEY WARD A'NEALS, a witness on behalf of the Plaintiff, testified as follows:

Direct Examination.

I live at 1124 Oak Grove Avenue, Chicago, and am and have been for 26 years in Chicago a land surveyor. I was employed by the Fine Arts Building people to take some 376 levels adjoining the Auditorium Building and in doing so I established a point in the Auditorium Building adjoining the Fine Arts Building. This point was on the north face of the Auditorium wall in the east line of the alley running north and south at the rear of the Fine Arts Building. I established this particular point August 28, 1917 in reference to City datum. The point as I then established it was 21.323 feet above City datum. The next observation was March 9, 1918, at which time there had been no change. On September 18, 1918, it showed a settlement of three-eighths of an inch, the reading on that date being 21.293 feet. The next observation was March 16, 1919. At that time there was no change nor on September 19, 1919, nor March 23, 1920, nor September 1, 1920, nor March 24, 1921, which were the dates of the next succeeding observations. On September 6, 1921, there was a change in the level and the height above City datum at that time was 21.283 indicating a settlement of one-half of an inch from the original elevation. The next observation was March 17, 1922 when the height above City datum was 21.273 indicating a settlement of five-eighths of an inch from the original elevation. September 20, 1922, the height was 21.273 above datum, being the same as on March 17, 1922. The next observation April 14, 1923 showed no change. September 18, 1923, the level was 21.263 above datum indicating a settlement of three-quarters of an inch from the original, and on March 15, 1924 the height above City datum was 21.218 indi- 377 cating a settlement of 1¼ inches from the original. The next and last observation was March 14, 1925 showing no further change.

Cross-Examination.

From August 28, 1917 to and including March 14, 1925, there have been recorded my figures showing a settlement at this point of 1¼ inches. I got my bench mark from the City bench mark on the McCormick Building at Van Buren and Michigan, about 250 feet, I should think, from the point I established. I used an engineer's Y level. This is an ordinary tube with a spirit bubble underneath it, and magnifying glasses. We read from a bench mark established on a building built on caissons which we know cannot settle and from there we transfer our marks upon the building we observe for settlement by sighting through this barrel. From the original bench mark at Michigan and Van Buren, I would first sight my instrument north and then reverse it and sight south, and take readings on 4 or 5 bench marks which I had made, relaying as it were from one to the next. In starting from one bench mark to another, I do not locate the top of the last bench mark with a magnifying glass. You measure a thousandth of a foot through the cross-hairs in the instrument. This thousandth of a foot is not approximate, it is the thickness of a line on my rule. In
378 running a relay or 3 or 4 stations, I might possibly vary several thousandths of a foot, but I should say not a hundredth of a foot. When I got to the alley, I would point my instrument west. I have here a plat of the Fine Arts Building exactly as it is laid out. It shows the driveway underneath the Auditorium, what might be called a tunnel. The point marked 16 is the mark I have been testifying about. That is put in with a knife. The point I should judge was 100 to 125 feet west of the building line on Michigan Avenue. The Fine Arts Building and the Auditorium join about 20 feet from point 16; they join over the driveway. Point 16 was cut in the brick wall with a knife, perhaps 10 or 15 feet west of the tunnel or driveway.

Cross-Examination.

I made these observations personally for the Fine Arts Building and furnished the figures to my employers.

R. FLOYD CLINCH, a witness for the Plaintiff was recalled and testified as follows:

Direct Examination.

As president of the Chicago Auditorium Association, I have given my personal attention to its management
379 and affairs for about 18 years. The Building is at the northwest corner of Michigan Avenue and Congress Street, extending about 187 feet on Michigan Avenue, by 361 feet on Congress Street, and 161 feet on Wabash Avenue. It is 10 stories high and constructed of very heavy stone masonry work. On the Michigan Avenue side is the hotel proper containing about 360 guest rooms. At the west end on Wabash Avenue is an office building containing about 124 offices and 6 stores. Near Wabash Avenue is a tower extending 7 stories above the main building. In the center of the property is the theater proper or auditorium, 120 feet wide from north to south and 242 feet long from east to west. The entrance to the theater is on Congress Street under the tower. The Auditorium Hall has a vaulted roof, the trusses of which support not only the roof itself, but also the dining hall or banquet hall with rooms used for the servants. The Auditorium Hall occupies a portion of each of the five leaseholds on which the Building is located. There are stores on Wabash Avenue side and one or two on Michigan Avenue. On lot 18 covered by one of the Studebaker leases, there are dressing rooms and I think part of the stage. The part of the building used for offices on Wabash Avenue is a part of the structure as a unit. When the Building was constructed every part was, so to speak, sacrificed for the benefit of the Auditorium Theater. The hotel part was small allowing only about 360 rooms and the same
380 with the office building. Everything was given up to one big public building for the Auditorium and the remaining part was utilized for foyers and entrance to the theater, and was cut up so that it could not be used except for the benefit of the theater. Those features of the building have cramped the development of the hotel as well as the office part of the building, because there is no room for spreading. The increased cost of operation, increased taxes, and every other cost have to be absorbed by the same building, because we have no way of extending our income on

account of the theater's location. In the hotel part, we are short of elevators and have no room to put in more. A part of that hallway is given to the theater entrance and the hall part of the Auditorium is stunted in growth. The hallways moreover are located so as to be rather out of fit because we had to conform first to the construction of the theater. This operates greatly to the disadvantage of the building. The theater walls are very massive and settlement is going on. This has made the structural parts crack and we have not only had to watch the repairs in the theater, but that brings on defects in the hotel part. The width of the massive exterior walls makes the rooms and the office and hotel building very dark; it makes the rooms much higher than necessary and detracts from their usefulness. These walls are so thick and massive that they take up a great deal of space in the rooms and also obscure the view from the rooms. The
381 wall is so thick that the window must be located at the outside or the inside or somewhere between so as to affect entrance of the light and the possibility of inmates approaching the window itself. The thickness of the wall makes a sort of alcove in the room in order to get at the window, and takes that much more of the renting space of the room. On account of the massive thickness of those walls, it is impossible to arrange the halls so as to divide the spaces on either side for utilization as hotel rooms or offices. Light comes into some rooms through the vacant space over the dome of the theater. I think there are four stories above the dome that could get any light from north of the building. The south rooms get light from Congress Street. Immediately north of the Auditorium Building on Wabash Avenue is the Giles Building which runs over as far as the alley back of the Fine Arts Building and shuts off the light from that direction. The east and west alley coming in from Michigan Avenue is only a tunnel for the greater portion of the way and above it the building is constructed and connected with the Fine Arts Building. There is, however, about the middle of the north side of the building a space where an alley comes down from the north; here
382 there is a small part of the private driveway where the building is not carried up to its full height of 10 stories and immediately south of this space is where the dome of the theater comes in. Except on the street frontage, the light for the rooms in the Auditorium Building is confined to this space over the dome of the theater and the space

where these two alleys join. After space was used for the Auditorium Hall and its access, there was left certain space in the building to the east and west that could be utilized for offices and bedrooms, and for access to these it was necessary to have interior hallways. This space could not be divided altogether so as to leave rooms on either side of those interior hallways; there are some on the upper floors above the theater dome, but not below; so that the arrangement of the hotel rooms is mostly around the exterior frontage. This is necessary on account of the character of the construction which prevents expansion and does not make attractive rooms. The space back of the line of rooms facing on the street is so small that only very narrow rooms can be placed there. This is due to the character of the construction of the theater and building. It could not be changed in a structural way so as to utilize that space. Since I have been president of the Corporation, I have given special attention and study to that problem and I have consulted 383 architects engaged for that very purpose and have gone over the question very carefully, and my conclusion is based in part upon their reports. The seating capacity of the Auditorium is 3600. Formerly it was 5000, but when the Opera Company leased it they wanted more boxes and a number of horseshoe boxes were made taking out seats, reducing the seating capacity from 5000 to 3600. When I became president the Auditorium was in pretty fair condition, but had then begun to show signs of deterioration and of sinking. It showed this by cracks in the structural parts. The walls would recede and that would bring about cracks into the structural part and we had to employ architects to have those reinforced and filled up very carefully to keep it in as safe a condition as possible. That has continued from then down to the present time. For instance, there would be a strain, a crack in one place would be a strain, maybe on the elevator, which would have to be strengthened. One would bring about another. There have been changes in the floor levels, there have been changes on the Congress Street side very largely on the tower, and I think on the north side near the Studebaker Building. On Congress Street, under the tower, you can by going in and walking on the floor see the floor sink; there is quite a depression there, almost a slant in some places, very perceptible. I could not tell the extent of the depression in feet or

inches without refreshing my memory; but should think
384 it had receded several feet. When I say "receded" I refer to sinking.

I have had general charge and supervision of the financial operations of Chicago Auditorium Association. It paid one dividend in 1892 of 1½ per cent on the capital stock. No other dividend has ever been paid. The taxes have been increasing each year. In 1891 they were $22,707.78 and have gradually increased until 1925 when they amounted to $157,678.32. That covers the whole property. The tax on the building itself has been reduced to a very low valuation. We appeared before the taxing bodies and they agreed with us that the value of the building was of no consequence and they cut it down to $100,000; it has been that way for the last 5 or 6 years. Counsel on the other side of this case have been accorded access to the books of account of the Corporation. Before my time when they paid that dividend, I think they probably did better. In the World's Fair year, there was a production known as "America" which they made a considerable profit on. Afterwards and especially since I have been in charge the earnings have been absolutely inadequate to meet the ground rents, interest charges and depreciation. In order to meet the rents and interest charges, we had to forego depreciation charges and we even then came out with a very small margin; sometimes $50,000 to the good, sometimes a little better. But it has been uphill work from the start. The operating ex-
385 penses of the building have increased during this period along with operating expenses on other buildings, and really more so. They increased so that if we had not secured a contract with the Congress Hotel Company for heat, light and power about 14 years ago, I think the concern would not have survived. By negotiations I got a favorable contract which enabled us to pull through. After the building was completed the hotel was leased to Southgate and the theater was operated by the Chicago Auditorium Association under the management of Milward Adams until 1907 when a lease of the theater was made to the Auditorium Theater Company in which Klaw & Erlanger were interested. This continued, I should think, three or four years when the Chicago Opera Company made a deal with them to take over their lease and conduct it as an opera. Before that time the Chicago Auditorium Association had itself secured attractions and run the theater. The Association would put

on its own attractions, sometimes on a rental basis, sometimes on a profit sharing basis and would furnish ushers and light, and the box office and selling of the tickets. The Association took a percentage on some of the shows and some of them they put on themselves and took it all. There is a very large and fine organ in the Auditorium Hall which was used in connection with special concerts on Sundays and Saturday evenings and other times, and in connec-
386 tion with other performances. The Chicago Auditorium Association would hire an organist and pay for the ushers and programs, and get the net results. That practice does not continue at the present time. The theater is now leased by the Chicago Auditorium Association to the Chicago Civic Opera Company and the Association has no interest in the financial returns of the entertainments and has not had since 1907.

The contract for heat, light and power expires December 31, 1925. I have taken up with officers of the Congress Hotel Company the question of extending the contract and they advised me that it will cost for renewal about twice as much as we are now paying. In 1926 we also have a re-appraisement under the Studebaker lease. The additions to our fixed charges from those two sources would approximately wipe out any profit we have made based on the way we are now operating without allowing for depreciation, but assuming that our gross receipts were as great as they were during the past year.

When the Auditorium Theater was constructed it was with the idea of taking care of all large gatherings in Chicago. We had Republican conventions there and political meetings of different kinds. The Union League Club would use it on Washington's birthday and for any public meetings.
387 Since then, however, other larger halls like the Coliseum have been put up, and as the meetings become larger the present Auditorium is not large enough to accommodate what it was built for. During the World's Fair we had a spectacular play or historical pageant called "America" representing the principal events in the history of the United States. For a long time the Thomas Orchestra used the theater for their concerts, but have since built a hall of their own. The noted artists like Paderewski and Galli Curci would have concerts there. The contract with the Chicago Civic Opera Company terminates two years from September 1, 1925. We have not taken up with them the question of a renewal of the contract

because we do not know whether the building will be in condition to go on with it, whether the theater would be safe to continue another lease. The lease is for five years and we haven't got to that point yet, because we want to determine what we are going to do with the property, waiting for the end of this lawsuit. The Chicago Civic Opera people have discussed the question of building an opera house or have expressed the idea that it might be to their advantage to build an opera house of their own. When I say "they" I refer to Mr. Insull who is in charge of the enterprise, so that if a Chicago Opera House should be built we would lose them as tenants. I do not know of any considerable enterprise which might be looked to as furnishing a tenant for the Audi-
388 torium at this time. Before we leased it permanently for the Opera, our revenue was so uncertain that we would not probably take a chance of renting it ourselves any longer. We were glad to lease it for a specified sum so as to know what our fixed income was. We would not attempt to run it by renting it spasmodically, if we could find any other alternative. It would be very disastrous. The Auditorium meeting hall is not now large enough to meet the demand for national political conventions. There are other audience halls in the City of the same or greater size than the Auditorium Theater; at least there is the Coliseum, and there is the Medinah Temple on the north side, and the State-Lake Theater, and the Pavilion at the Stock Yards, with larger capacity than the Auditorium. Milward Adams died about two years ago.

We have given consideration to the construction of a new building on the Auditorium site. We have had tentative plans drawn up by our architects, Marshall & Fox, showing what we ought to have there, what could be had there, and the estimate of what it would cost. They have designed a building which would take care of an auditorium for the Opera in case we could lease to the Opera, and also taking into consideration another hotel of larger size with caissons and going up to the greatest height allowed by law, and utilizing all our space. Estimates have been made of the cost of such a
389 building, approximately $15,000,000. The estimate was made by the architects after figuring the cost per square foot. They figured it out very carefully and told us it would cost us about so much money. They did not write me a letter, it was a verbal talk. The plans were prepared and I personally discussed the cost with Mr. Fox and so did some

of our directors. I think the architects of the Chicago Auditorium Building when it was constructed were Adler & Sullivan. Neither of the members of that firm is now alive. I have taken up with bankers and financial houses the question of financing the construction of a new building on this property. I took it up with three houses. I took it up with the Central Trust Company of Illinois, of Chicago, and Halsey, Stuart & Co., of Chicago and New York. I have written propositions from each of the houses in which each expressed the opinion that they would be glad to undertake the financing of it. The document now shown me is a state from the Continental & Commercial Trust & Savings Bank of Chicago, one of the houses to which I have referred.

(Said statement was offered and received in evidence as Plaintiff's Exhibit 0, and is as follows:)

390 Continental and Commercial Trust and
Savings Bank.
Chicago.
March 30, 1925

Mr. R. Floyd Clinch, President,
Chicago Auditorium Association,
Chicago, Illinois.
Dear Sir:

We have your inquiry in regard to what financial arrangements can be made by the Chicago Auditorium Association, which has a total of $1,765,300 common stock outstanding, (no preferred) for the improvement of its property, against which there is a total indebtedness of about $1,375,000 secured by Mortgages on the present building and leaseholds, the area of the land being approximately 62,280 square feet.

We understand that about 53 ft. of the Michigan Avenue frontage is under lease, expiring in 1985, providing for periodical valuation of the fee and a net annual rental of 6% of the valuation so fixed; the rest of the property being covered by leases running about 100 years longer and carrying net rentals which amount in the aggregate to $44,000 per annum without any re-valuation clauses.

We understand you are considering the improvement of this property by the replacement of the present structure with a modern steel construction building to be used for hotel and auditorium, or for other business purposes, this building to represent an expenditure possibly as high as $15,000,000.

We have given this matter careful consideration, and feel

confident there will be no serious obstacle to the raising of the necessary funds when the proper time arrives, and we should like to have the opportunity to negotiate with you. If you decide to go ahead with the construction above outlined we believe there should be no difficulty with regard to reaching an agreement whereby you will be provided by means of a bond issue, and through the sale of preferred and common stock, with sufficient funds to retire the present indebtedness and provide the additional capital required for the new consruction.

Awaiting your further advices in due course, we are

Yours very truly,

GEO. W. PEARSON,

GWP/LRD *Manager Bond Department*

391 The document now shown me, purporting to be signed by the vice president of the Central Trust Company of Illinois, is one of the propositions to which I referred.

(Said document was offered and received in evidence as Plaintiff's Exhibit 41, and is as follows:)

rs
t 41.

Central Trust Company of Illinois
Capital and Surplus $7,000,000.
125 West Monroe Street

Chicago, April 8, 1925.

Mr. R. Floyd Clinch,
President, Chicago Auditorium Association
The Rookery,
Chicago, Illinois.

Dear Sir:

With respect to the financial arrangements of the Chicago Auditorium Association for the proposed improvement of its property at Congress Street between Michigan Avenue and Wabash Avenue, we have carefully considered your inquiry. You advise us that the Chicago Auditorium Association now has a total bonded indebtedness of about $1,375,000 secured by mortgage on the leaseholds and present building, and that the corporation has outstanding about $1,765,300 of stock, all common.

We also are advised that all of the Auditorium site except about 53 feet of the Michigan Avenue frontage is held by the Chicago Auditorium Association under leases running until about the year 2085 under which the net rentals are $44,000 per annum for the remainder of the term without any pro-

visions for revaluation; but that the 53 feet on Michigan Avenue is under leases expiring in 1985 and containing provisions for revaluation every ten years, and the payment of a net rental on a six per cent basis on the valuations so determined.

This letter assumes the correctness of the above statements. We understand your Company desires to replace the present Auditorium Building with a modern building of steel construction, the cost of which might run as high as $15,000,000, but that you are not prepared to enter upon definite negotiations until the suit now pending in the Federal Court, involving your right to make these changes, has been disposed of. If the right of the Chicago Auditorium Association to rebuild in the above manner is established, we should appreciate the opportunity of taking up with you the question of furnishing the necessary funds and we believe that we shall be able to arrive without serious difficulty at an agreement with you by which, through the medium of a bond issue and the sale of stock, you can be provided with adequate funds to finance the above project and retire the present outstanding bonds.

Hoping to hear from you further about this matter as soon as you are in a position to act, we remain

Yours truly,
JAMES G. ALEXANDER,
Vice President.

JGA-ALM

392 The document I now have in my hand is the proposition to which I have referred from Halsey, Stuart & Co.

(Said document was offered and received in evidence as Plaintiff's Exhibit 42, and is as follows:)

Plaintiff's Exhibit

Halsey, Stuart & Co.
201 South La Salle Street
Chicago, February 17, 1925.

Mr. R. Floyd Clinch,
President, Chicago Auditorium Association,
Chicago, Illinois.
Dear Sir:

You asked our views about the financing of a new building on the site now occupied by the Chicago Auditorium. From your explanation we understand that the plans contemplate the removal of the present structure, which has outlived its usefulness, and the erection of a modern steel-construction building adapted for a hotel and auditorium or other business

purpose. We understand the Chicago Auditorium Association does not own the fee, but occupies the premises under several ground leases, some of which expire in the year 1985 while the others have a hundred years longer to run. We understand the leases expiring in 1985 cover a frontage of approximately 53 feet on Michigan Avenue and carry a net annual rent on a six per cent basis fixed by periodical appraisements of the land values, while the other leases, running until the year 2085, provide for net rentals aggregating $44,000 per annum. We understanding there are outstanding bonds in the amount of about $1,375,000 secured by mortgage on the building and leaseholds, and the corporation now has about $1,765,300 par value of common stock outstanding.

On the basis of this statement there will in our opinion be no difficulty about financing the proposed improvement, or in raising funds, through the issue of bonds and preferred and common stock, sufficient to take care of the present bonded indebtedness and provide additional capital, up to $15,000,000 if necessary, to pay for the new building; and whenever you are ready to do business we shall be pleased to take the matter up with you with a view to undertaking to furnish the entire amount.

Yours truly,

HLS-F HALSEY, STUART & Co.

393 Mr. Washburn objected to these papers as incompetent and being merely expressions of opinion.

The Court: They certainly could not be offered as proof of any facts stated in them.

Mr. Fisher: They are offered merely to show the negotiations and the ability of the Company to put up a new building so far as the communications so state.

The Court: Objection overruled.

The Witness: Before the commencement of this suit and in the fall of 1921, I took up with some of the representatives of the leasehold estates the question of tearing down the present building and replacing it with a new and modern fire proof structure. In the latter part of September, 1921 or in the early part of October, I went to Washington in response to telegraphic summons from General Dawes who was then chairman of the Budget. On the train I met Mr. Mitchell D. Follansbee, whom I knew to be attorney for one of the fee owners in Boston, for the Sears Estate and I think the Slater also. We had a very interesting talk about the Auditorium situation. He asked me how we were getting along. I told

him, as he knew, that we were having a hard time to make ends meet; that our heat, light and power contract expired in a few years, that the building was getting old and depreciated and in a few years would become dangerous;
394 that in order to preserve our equity and get any return on our investment, we would have to put up a new building. I am telling what I said to Mr. Follansbee, and that I have had a discussion with our attorneys on the subject and the leases are somewhat silent; it didn't say whether we had any right to tear it down or didn't have any right, but our attorneys were clearly of the opinion we had a right to construct a new building there provided we gave security until the new building was up. Well, he say, "That seems very reasonable, but, of course, I have not looked into it from a legal standpoint." I said, "Now, will you talk it over with your clients while you are east?" He said, "I will." And I said to him, "In case there is a difference of opinion, perhaps we can buy the fee or increase the ground rental by a small amount, say a couple of thousand dollars a year." Well, he said, "I will take it up with them. They are very fair people." It was left in that way. Shortly afterwards when I returned from Washington, Mr. William Boyden of the firm of Fisher, Boyden, Kales & Bell and I went over to see him and he showed us a letter which I think he had received from his clients and said he would take it up again; that perhaps we ought to have a meeting; that he was going to Europe and would prefer to have his partner Mr. Samuel Adams go on with the negotiations. A few months or
395 weeks after that we had a telephone communication from Mr. Adams who said his clients were to be in Chicago shortly and perhaps we had better all get together and discuss it. So we made a date to meet with them Sunday evening, May 27, 1922, at the Chicago Club. Mr. Boyden and I came in from Winnetka and met Mr. Adams, Mr. Malone and Mr. Warren, I think, and Mr. Tuckerman, who are defendants in this case. After exchanging a few comments with them, we went right into the subject of our meeting. I told them I had had this discussion with Mr. Follansbee; that we had to do something very soon with the building in order to hold it together, and told them our attorneys had advised us we had a perfect right to reconstruct. Mr. Kales was emphatic to that effect. He was a member of the firm of Fisher, Boyden, Kales & Bell. "Well," Mr. Adams said, "I don't think you

have that right at all, Bill," turning to Mr. Boyden; and Mr. Boyden said, "I don't think there is any question about it." Then I said to them, "Gentlemen, this litigation, if it comes to litigation, would be long drawn out and expensive. Perhaps we can get together on buying your fee." Well, they said, perhaps that would be the best way. "What do you think it is worth?" Well, I said, "You ought to figure it on a 5 per cent basis. The rent you are getting now would bring it up to about $300,000." Well, they said, "We don't think we ought to take that. We are trustees representing some minors and future heirs," and they intimated that $400,-
396 000 would probably be nearer to what they considered would be right. And I said, "Well, we might suggest splitting that difference, making it $350,000, provided we could agree on a satisfactory basis with the Willing estate, and we couldn't pay you any price unless we agreed with the Willing estate, and we would have to buy both or none."

After some discussion it was suggested that it would be better for their attorneys and trustees to meet with Mr. Kales who had had the matter in hand, and we adjourned the meeting that evening to meet in Mr. Boyden's office the following Monday morning. We all met there and Mr. Kales came to the conference, all the others who were at the meeting on the previous day being present; the same people who were present at the Chicago Club the day before. Mr. Kales was very emphatic. He said there wasn't any shadow of a doubt in his mind, and went on to explain some parts of the law where he was sure he was right. Well, the discussion rested then. They said, "Well, you don't know whether you can buy our fee. Perhaps this had better rest until you have had some negotiations with the Willing estate and see what you could do." So it was adjourned without coming to any conclusion. A month or so later, I think in June 1922, I made an appointment with Mr. Mark Willing and Mr. Ambrose Cramer, defendants in this case, in the Monadnock Building and we sat down and had a discussion on the same ground.

There were present Mr. Mark Willing, Mr. Ambrose
397 Cramer, and myself. I told them briefly that we had had this up with the Boston interests and what we could not buy their fee unless we could agree with them on theirs. Well,—Mr. Willing seemed to think that he didn't know whether he cared to sell; that he disagreed with me as to our ideas of right to reconstruct without consent, but in the course of the conversation they said they might sell for a

million and a half. Well, I told them that was out of the question; that we could not consider anything of that kind, and if we could not come to any closer terms I presumed the only thing to do would be to bring a friendly suit in equity. Well, he said he guessed that was the only thing that could be done. I asked him if we brought that suit if he would cooperate with us to a speedy conclusion on account of the conditions there, heat, light and power contract running out, and the condition of the building, and he expressed a willingness to do all he could to accelerate it.

I do not remember more in detail just what Mr. Willing said about disagreeing with me on the right to tear down the building. He said they had also consulted attorneys and his conclusions were arrived at after advice from his attorneys that we did not have the right to tear it down. At the interview with Mr. Malone, Mr. Tuckerman and Mr. Warren, to which I have referred, they very candidly said they did not want to be considered in a hold-up position, that they wanted to be perfectly fair and just, and if they were not trustees they might look at it in a different way, but being trustees they had to take the advice of their attorneys in order
398 to protect themselves. They said the advice was from Mr. Adams and that they did not think we had the right to tear it down. At the interview when they were present in Mr. Boyden's office, Mr. Adams discussed that question. He said he differed from both Mr. Boyden and Mr. Kales as to our having any such right. He denied it.

With the exception of its interest in the buildings and leaseholds involved in this suit, the Chicago Auditorium Association has no assets except cash balances which it might have on hand; no other outside property except its interest in this leasehold and buildings. It has certain securities and existing leases on parts of the building and the Auditorium.

The documents now handed me are the plans for a new building to which reference was made this morning and which Mr. Mason suggested he would like to have produced if there was anything in writing. The reason why they purport to relate to a building known as the "Capitol" rather than the Auditorium, is that we did not want any plans made public which would show that the Auditorium was contemplating the erection of a new hotel or any changes, since this would make our tenants restless and they would move out. We used the name "Capitol" pursposely just to give it some name to identify it by.

(Said document was offered and received in evidence as Plaintiff's Exhibit 43 and is as follows:

399 When the old Opera lease ran out and the new Company was organized, there were certain conditions in the old lease with which the Chicago Opera Company had not complied, such as improvements to be made at the expiration of the lease. For that reason the new Civic Opera Company had to take up with the old Company the adjustment of those differences. Accordingly when we renewed our lease, it was at an increased rental with a letter passing from Mr. Insull to me that when he got back from Europe we would have a written lease for five years at the increased rental substantially on the terms of the old lease. That new lease has not yet been executed, but they have been paying rent and carrying out the terms exactly as agreed. My recollection, without referring to the document, is that it expires two years from September, 1925.

The bonds or securities to which I referred as belonging to the Chicago Auditorium Association amount approximately to $375,000, principally government bonds. This fund was accumulated to take care of any sudden and unexpected expenditures which might develop and which we are in fear of all the time due to the fact that our heat, light and power contract expires at the end of the year 1925. We may have some expenditures to make in that connection and we do not dare to distribute funds on hand. At one time we were short of funds and could not pay our taxes, and I had personally

400 to guarantee to the bank the money we borrowed to pay the taxes. That occurred also when we were making some alterations to the hotel and the contractor threatened to put a lien on the property unless he was paid. We did not have the money to pay it and I had to guarantee the contractor personally and work it out gradually. I should think the occurrence about the contractor was about 1910 and about the taxes 1912. The last two years we have been doing a little better, last year there was an election in the country and we had headquarters at the hotel which filled it up. We have also increased our rentals a little bit on the offices and have got a higher revenue from the theater, so that we have run a little better in the last few years but not enough to absorb our depreciation. If we took that off we should still be in arreas. This year we are running behind and our receipts are much less than last year. For the first six months of the present fiscal year, we are in the neighborhood of $18,000 net

behind our earnings for the same period last year. The fiscal year of the Association ends November 30th.

Cross-Examination.

I think it was about 1905 that I became a stockholder in the Auditorium Association. In 1906 I became a director and in 1907 president. My predecessor as president was
401 Henry Dibblee for maybe four or five years, and his predecessor was Ferdinand W. Peck mentioned in the articles of incorporation, who was the first president. Mr. Peck was very active in the building from the outset. I was living in Chicago and watched it being built. At that time I rather think I was living at No. 1212 Michigan Avenue. I was then connected with the Joliet Steel Company with offices in the old Honore Building at Dearborn and Adams Streets where the Marquette Building now stands. I now own approximately 1800 shares of the Chicago Auditorium Association. I cannot say that I control any other shares and there is no syndicate in which I have a participating part, and no trust agreement or voting trust. The majority of the large stockholders have worked in harmony with me and have told me they will continue so to do. I consider that not a control, but an assurance of control. I cannot say how many shares I have under this moral control. I am in the same position as the president of any other corporation, as long as the stockholders have confidence in me they will keep me and when they lose confidence they will get somebody else. In 1906 I did not have 1800 shares; probably I had 150. I increased my holdings gradually. When stock was offered to me and I had money to pay for it, I would buy it over a period of years. I own a few bonds, four I think. There are two vice presidents, William H. Colvin and R. B. Slaughter. The Secretary is A. W. Sawyer living at Sycamore and the Treasurer is Joseph E. Otis. They are directors excepting
402 Mr. Otis. The directors are Messrs. Sawyer, Colvin, Slaughter, Rew, Hetzler, Budd, Taylor, Fox and myself. I have been living in Hubbard Woods about 16 years. Before that I lived two years in Winnetka and before that in Chicago. I never lived in the Auditorium and have no room there now. I have an office in the office building. I have a place where I can stay over night if I wish, but none specially set aside for me. When I stay at the hotel I pay my bills the same as anybody else with the exception of the room. I do

not pay for the room because I am supposed to have a room free, but I do not take a room free because we have not enough rooms to afford to have a room set aside free. I stay there occasionally, several times a year. Officers and directors of the Company have stayed there during the last five years, but they have paid for their room. I do not think Mr. Fox stays there occasionally.

In 1885 I was 20 years old. I had not the slightest idea of being president of the Auditorium Association, but I observed the improvement as it went on because I walked to and from my office to save car fare and could not help noticing the improvement. It was not until after the erection of the Auditorium that the general improvement of Michigan Avenue began and more particularly after completion of the Auditorium annex in 1893. I refer specially to improvements

south of Congress Street. The Montgomery Ward Build-
403 ing is on Michigan Avenue north. It may possibly be
250 feet high including the tower; considerably higher than the Auditorium. When the Auditorium was first completed, people used to ride up to the tower to look over the City and one source of revenue when I became president was 25 cents per capita for visitors to the tower. I think the Fine Arts Building was put up just a little before the Auditorium. It was a building of about 10 stories with stone front and is the same building now in use there, unless they have added to it. I am not sure whether they have done so or not, but it is substantially the same building. North of the Fine Arts Building and in the same block was the old Art Institute now the Chicago Club, a stone front building on the corner of Van Buren, which was there before the Auditorium. I think the Auditorium Annex was started in 1890 or 1891 and that it was completed before the World's Fair. The Stratford Hotel now replaced by the Straus Building was at Jackson and Michigan. I think it was built before the Auditorium. It was a good sized hotel for that period and was not torn down until two or three years ago; until then it was in active use. I should think the University Club at Monroe and Michigan was built about 12 years ago, but I may be wrong. I should think the Blackstone was put up about 12 or 15 years ago.

It is about three blocks south of the Auditorium. Be-
404 tween it and the Auditorium is the Congress Hotel and
the Stevens Hotel is going up. The Stevens Hotel is to be a very large modern hotel and there is or was a theater adjoining the Blackstone Hotel on the north. There were two

theaters in the Studebaker or Fine Arts Building, but on account of the difference in size, they did not compete with the Auditorium theater. They used for a stage entrance the same alley which the Auditorium Theater uses. When the Auditorium was built I think Wabash Avenue was a more important business street than Michigan Boulevard. At the time of the World's Fair in 1893, Michigan Avenue was beginning to become more important. The Auditorium Hotel and Annex had a great deal to do with the development of South Michigan Avenue, but before the coming of the elevated roads Wabash Avenue was the more important business street. I do not know whether the elevated made a difference or not; I think it is the improvement of Michigan Boulevard which has drawn from Wabash.

It is substantially correct to say that the Auditorium Building as a whole is like three sides of a square with the front on Michigan Avenue, one side on Congress, a third side on Wabash and the interior of the square open at the north filled on a lower level with the theater. I did not notice the
405 excavations for the foundation under the theater at the time they were made. I have been all through the building but am not enough of a technical man to describe the stage constructions. I know there are a number of cylinders but cannot say whether or not they are 16 inches in diameter or extend down 30 or 40 feet. They are metal or hydraulic cylinders and the stage floor rests upon them. The stage can be raised by pulling a lever and letting water into the cylinders to force up the pistons. I could not say whether since 1906 there has been a time when they did not work, but I know they have had some difficulty. The inside of the hollow square containing the theater is about 120 feet wide from north to south. The stage is a very large one. The stage is one of the largest in Chicago and one of the largest in the world. I should think it would hold a thousand people. We have had some elaborate spectacular shows with animals, and elephants, and crowds, and everything on the stage. The acoustics of the theater are supposed to be the very best. I think it is the largest theater in the World next to the Opera House in Paris. It originally seated about 5000 people, but the capacity was reduced by replacing seats with boxes. I know the difference between dead load and live load with reference to sustaining ability. I do not think that putting in those boxes added to the dead load of the building. Mr. Fox, the architect, had charge of that. We never had

406 any fires of any consequence in the building. We have had some minor fires, some of the floors may have burned, but none of the outer walls. We never had any damage done by earthquake, nor by cyclones, nor wind storms, unless to plate glass; nothing serious.

Before I became president, Milward Adams managed the theater. He devoted himself entirely to the theatrical business, the booking office. When the building was dedicated President Harrison and Vice President Morton were there, and the Governor of Illinois, and Ferdinand W. Peck, and Adelina Patti sang. It was the event of the City at the time. Mr. Adams had shows in the theater as regular as he could get them. I do not think there was any time when a performance was omitted by reason of danger, defect or other default on the building. Since my personal connection about 1907, performances have been given when scheduled and there has been no time when the theater was not capable of use. There was a period when the Opera Company seriously considered whether they should go on with their performances and we had the architects go over the building and had some parts of it fixed. They were very apprehensive and there was a question whether they would continue. We have a directors' meeting. They were very apprehensive whether they were doing their duty to the public by going on with their performances.

407 We told them we would employ engineers and go over it carefully and then continue each year to watch any movements and if we found any movements going on which were serious, we would call it to their attention and we have done so every year since. The performances by the Opera Company have been given every year and the Chicago Civic Opera Company gave grand opera in the theater during the season of 1924-25. The building was never shut down or the opera suspended on account of danger in the building or walls. That is true for the last 10 or 15 years. I frequently attended the Opera during the past season and house was pretty well sold out. The Shuberts are sub-tenants of the Opera Association and are very large producers of theatrical performances. They give performances in the theater when the Opera is not put on. Dr. Gunsaulus used to preach in the theater every Sunday morning, but no church is held there now on Sundays. The program for this fall and winter is for another season of Opera. The Opera and concerts of the theater are supposed to be of the highest class. Sometimes moving pictures are given there. There are dressing rooms along side the stage

which has around it the usual amount of scenery equipment and storage rooms. The main balcony in the theater is the one sloping down almost to the level of the upper tier of boxes. I should think the balcony alone would seat as
408 many people as the average Chicago theater. I should think there are about 50 boxes forming a social center in Chicago at the Opera and other performances. It is the only Opera House in Chicago. The talk I had with the Chicago Civic Opera Company people about a new opera house was casual. Mr. Insull expressed the desirability of its having a theater of its own. The Chicago Civic Opera Company is not self supporting. I know this very feelingly because I am one of those who help support it. I think the deficit this year was approximately $400,000. The Opera Company has a deficit every year and has not itself money with which to build a new opera house. Individuals would have to do it for the Company.

There is a recital hall on the Wabash Avenue side. Whether it is over the proscenium arches, I could not say. I think this hall is entered from the office building on the sixth floor. I think, without looking it up, that the floor of the recital hall is substantially the roof of part of the theater.

409 The banquet hall is on the Michigan Avenue side of the building, on the east side of this three-sided square. It doesn't extend over the stage at all. The space between the back wall of the stage and the front on Michigan Avenue I should judge to be about in the neighborhood of 75 feet. There is an open alley space there, roughly, 20 feet, which lies between the back wall of the theater and the hotel, but not extending clear through to Congress. Except for that one cut-in, all the rest of the Michigan Avenue front side of the square is hotel. There is another alley on Michigan Avenue between the Studebaker, which is kept vacant for the scenery to go through. It is not a tunnel; driveway is more proper. The Hotel occupies this entire Michigan Avenue frontage, with the exception of one or two stores in the Studebaker lease part. From the Congress street wall to the theater wall going north and south, I should judge is about 40 feet. The main floor on Michigan Avenue is occupied by the lobby, with the exception of the store at the north end. There is mosaic floor all through the building. On the Congress Street side of the main floor is the dining room at the corner of Michigan and Congress Street. There used to be a bar back of that. It is used as part of the cafe now. Between the dining room and

cafe and the theater wall there is an entrance to the theater, and there is a corridor in the basement of the Congress through which you can go from the Congress into the
410 Auditorium Hotel and Theater, about six feet wide.

We have rooms on the Congress Street side of the hotel, and there is a hallway above the other passage against the north wall. There are guest rooms for the use of the hotel between that passageway and Congress. Between that passageway and Congress are some of the largest rooms in any hotel in the city of Chicago, too large. The thickness of the wall interferes with them because if we did not have such a thick wall they would be larger; it interferes very greatly with the light. If the walls were not so thick, the rooms would be as wide but not so long, but we have to have them long on account of that massive wall. On the third floor, on the Michigan side, we have rooms, with a hall between the rooms and the elevator. There are rooms partly on both sides of the hall; except where there is a courtway. That courtway is opened out in the back for service purposes, and of course there is the obstruction of elevators, which are on the west side, too, right in front. I am talking about the hotel elevators. There are two elevators on the Michigan Avenue front there, and two in the rear, and we have one more called the cannon-ball elevator, right west of and behind the Michigan Avenue elevators; right behind them. They are hydraulic elevators. I should say they are the same elevators that were there when I became president; they may have been reconstructed once or twice, but the same style of elevators.

They are nearly always in use. They have been out of
411 service one or twice temporarily. I should guess—they would hold eight to ten or twelve people. They are very slow.

On the floors on the Michigan Avenue side of the hotel, commencing with the third and running up to the tenth, there is no substantial difference in the arrangement. On the tenth floor we have the so-called banquet hall. It is not very frequently used, because the banquets now are taken to the newer hotels and larger hotels, but wherever we can we use it. The banquet hall was there when the hotel was first built. The ceiling in the banquet hall is an arched ceiling. We never attempted to divide the banquet hall up into bedrooms.

On the Congress Street side of the square, the hotel arrangement from the second or third floor to the sixth or seventh floor, where the top of the theater comes is practically

the same. All this space, from the ground up, is occupied by the halls and the rooms. Above the level of the top of the theater on each side of these halls there are hotel rooms. This space has been used for hotel purposes ever since my acquaintance with the building began. The hotel has been actively conducted every day and every night. It is known
412 all over the country pretty well. It is a very well known hotel of the City of Chicago, and has been ever since it began. We have some patronage from such things as banquets, club meetings, dinners and the like, but not as much as we used to have. I am sorry to say we have not a great deal, but we probably have our percentage. We have a few permanent guests and a great deal of transient business. As to whether the hotel is making money, you have got to qualify that answer, because if you charge up to the hotel its proportion of taxes, its proportion of ground rent, and its proportion of interest, it is a question of whether it does pay. If you charged everything to it it would not. As to waste space, the theater itself is so constructed as to take up, with these massive walls, so much room that should not be taken up, and that is waste space. The theater itself is so constructed that these massive walls take up so much dead space which could be utilized for other profitable uses it prevents us from expanding.

The tower is seven floors above the building, six of which are rented for offices, and the top one has the water tanks on it. I think every office is rented. On the Wabash Avenue side of the square is the office building and elevators going up to the offices; these hydraulic elevators with a capacity about the same as those in the rent of the building. There are 124 offices, of which there may be 120 occupied, but approximately
95 to 98 per cent is being occupied. That has been the
413 condition pretty generally. There have been times we have gone a whole year with vacant offices, due to inability to get a tenant, nor to any structural defect in the building. There are mosaic floors.

I can't answer specifically, when and where structural parts of the building have cracked, because it has cracked several times in several places. By structural parts I mean some of the cast iron, or some of the iron beams, or whatever you call them. I don't know what the technical terms are, but our engineers and architects can answer accurately any questions on that. It is not a fact that no substantial repairs to the structure have been made for many years. We have spent

quite a little. I should think some was spent in the last two years. The architects will tell you all that.

Speaking of waste of space, I mean if they were building a hotel now they would not make the ceilings so high or the walls so thick. If the ceilings were lower we could make the rooms smaller, and get more rooms out of the same space. And if the rooms were not so long and narrow we could make two out of one of those long narrow rooms, and have two where we have one.

The date on Plaintiff's Exhibit 40, March 30, 1925, was not the first time we had had any correspondence with the Continental and Commercial Bank with reference to the subject matter. I took it up with them before that, and they told
414 me they would give it some study and then write me what they would do about it. I should say I probably took it up informally, probably six or eight months before I finally got this information from them. I took it up with one of them before we started this lawsuit: with Halsey, Stuart & Co. They are the people referred to in the bill of complaint as "the people your orator is obliged to deal with." They are not the only ones I had approached up to that time. I talked informally with the Central Trust Company. I am a director of the Central Trust Company. I couldn't tell when I first took it up with the Central Trust, but I took it up with all of them pretty nearly the same time, with the exception of Halsey, Stuart, whom I took it up with a year or two previously. I thought it would be better to have a large outlay of this kind, large investment, handled by more than one house. That is why I took it up with other banks. Halsey, Stuart & Company was willing to handle the whole thing. I asked them to write me. I did not write letters to them. I went to see them myself. I got these letters to show we would be able to make the improvement if we were successful in this lawsuit. I did not go before the various committees of these financial institutions and show them the plans which are now in evidence as Plaintiff's Exhibit 43. I just told them in a general, concrete way, what we wanted to do. I told them
415 it would be necessary to take up some of the outstanding bonds. I told them we would have to win this suit. There is nothing more definite than is contained in these letters. There is no contract. There is no written or oral understanding, which binds any of these companies to construct that particular building mentioned in the plans as Plaintiff's Exhibit 43, because no bank would care about any specific plan,

as long as the project was sufficient to earn the money on the investment they put into it. I have no contract, no rate of interest fixed, because they could not tell until the time came what the rate of interest would be. There is nothing more than is contained in these letters. You can't go into a bank and get them to commit themselves until you have something definite to put before them. No bank either in Chicago or anywhere else would make a binding contract until they had a concrete plan, but they are willing to entertain the concrete plan. We have no concrete plan until we know the outcome of this suit.

I did not on my direct examination fix the date of the conversation at which I said Mr. Willing and Mr. Cramer were present. I told you it was in 1922. I think it was June, 1922. It might possibly have been July—I fix it because it was comparatively shortly after our conference with the other interests in Boston, which was May 7. I think that was the only real conference we had at which Mr. Willing was present. We have met occasionally and we would talk over this indirectly.

I do not remember in that conference telling Mr. Willing
416 that we were not making money and would like to put some stores in. I am very clear in my mind that it was at this particular conversation that a million and a half was talked about. Mr. Willing mentioned that figure. That was the same conversation in which there was some conversation about a suit being friendly for the purpose of finding out the rights of the parties. That statement was made at that same meeting, when I told him we could not consider anything like that, that if we could not get together we would have to start a suit in equity, and evidently we were both of the same opinion, and I asked him if he would do all he could to hasten it. He said he would put no objection to it. I rather think that was the first time I had ever mentioned to Mr. Willing the question of tearing down the Auditorium and putting up another building, but I had spoken of it to Mr. Cramer several years before; I went into details with Mr. Cramer, in which he told me that the construction of the trusteeship was such, that they could, if they wanted to, help finance it by taking stock in the new enterprise.

The Court: In this conversation which you had with Mr. Willing was anything said by him as to the reasons why he was taking the position that you could not tear down this old building and put up another building?

The Witness: Yes, he said he thought they ought to get more rent.

417 The Court: Did he say anything about wanting this monument to the city to stand there? Did he put it on the ground of public interest?

The Witness: Absolutely not.

The Court: Did you go into the reasons with him?

The Witness: Yes, I did .

The Court: Tell me just as fully as you can what he said as to his reasons.

The Witness: Well, he said he thought the property—I told him the reasons were that were not only not able to make —no interest on the investment, but we had had great difficulty in holding the property together: that we thought we should be allowed to put up a better building and they would have a better security by having a building there with caissons, a twenty-two story building, rather than the building we have got here, and he said, "Well, if you do, we think we should get more rent." I said, "Well, you made your bargain there for rent. You agreed to lease it for so much. You leased it to us for 199 years and we will continue to pay you rent, and during the interval we will furnish you with any security any court says is fair and right, until the new building is up, and then you have got better security." He said, "Well, that is all right, but if you get more money out of it we think we are entitled to more rent, and you put up that

418 building and you have got to agree with us before you take that building down. It takes two to make a bargain."

Mr. Cooper: Q. Was that when you offered him a thousand dollars extra?

The Witness: I didn't offer him a thousands dollars extra.

The Court: I think he said two thousand.

The Witness: No, I said a few thousand. No, the two thousand was to the Boston heirs, because their rent was so much less.

The Court: What did he say he would do if you did not agree with him on the increase in rent?

The Witness: Well, I stated to him that we would then have to determine what our rights were under the lease, and the only thing I could see was to bring a suit in equity.

The Court: Did he say anything as to the position he would take?

The Witness: Yes, he said he would do all he could to hasten a decision; would not put any obstructions in the way. I asked him that specially. I said haste was necessary in this matter.

The Court: With reference to the construction of this lease, did he say he would oppose you or coincide with you?

The Witness: Oh, he said he opposed it.

Mr. Cooper: Q. Did he say whether or not he consulted counsel?

The Witness: I understood him to say he had. I think he consulted the Boston interests, or the Boston interests
419 consulted him, so he knew just what I was coming over therefor. Mr. Willing told me he had consulted counsel. He did not say who counsel was, not at that time; later he did. He told me it was your firm.

It is a fact we have raised our hotel rates in the last four or five years, and have raised the rentals on all of the rooms. That is why it made a better showing the last few years. The rates have been raised in accordance with the increase in price of every commodity in general in the United States. Since we raised our rates we have made a somewhat better showing than we did before. There have been more new hotels put up than in 1880 and 1890, compared to the population, and we have had more competition in the last five years than ever before. We are getting more out of the theater now than we ever got. We are now getting $115,000 a year from the Chicago Civic Opera Company, and we get paid for the electric current. The drugstore brings in a bigger rent in this last lease than it ever did before. The other stores on Wabash Avenue have been harder to rent because competition there is very keen. I should not say they pay more now than they ever did before; if so it is very little more. They are all occupied, and always have been, with the exception of an occasional vacancy. We have never had the corner drug store vacant. We get some money out of the concessions in the lobby of the hotel.

420 The contract for heat, light and power that is about to expire was made about fourteen years ago;—it expires in December of this year, and it runs for fourteen years. I know electricity is getting cheaper every year, and that it is a whole lot cheaper than it was 14 years ago, but when you couple heat with, that is a different proposition entirely. We pay $54,000 for heat and light and power. Under the contract which we had with them before, based on what we

are using now, we would be paying over $100,000, and they claim now that they will want at least double what we are paying. We had a heating plant of our own before I became acquainted with it. The present plant that furnishes us heat is under the Congress Hotel. They are not going to tear down the Congress Hotel right away. There is a plan to put on an addition. There is no reason why we cannot take electricity from the Commonwealth Edison Company when this contract expires, but there is a reason why we cannot take electricity for running our elevators, because if we do that, we would have to equip our elevators for electricity, which would cost three or four hundred thousand dollars. We use a hydraulic system, and the stage and everything would have to be electrified. If we were connected with the Commonwealth Edison Company we would have nothing to operate our hydraulic system, which is operated by cold water. You have got to have power to work it. It is not water power. It may be water, but you have got to get steam
421 or some heat in there to operate it. You can't operate it just by pouring cold water on it. The elevators under the stage are raised on plungers. You have got to have steam there to generate with. If we electrified the hotel and office elevators how are we going to operate our stage? That comes from the Congress Hotel. The Congress Hotel would not take a contract to supply an infinitesimal amount of power without charging a very large sum for it. To raise the stage by electricity would cost a great deal of money, and it could be done if we had the money to do it with. It is the hotel that is causing the $18,000 shrinkage this year, and last year was an unusually good year due to the Republican National Campaign managers who had offices in the hotel.

The assets of the Auditorium Association consist of this $350,000 of bonds I have mentioned and the leasehold estates in the buildings. That is all, except a little cash on hand; and leases for the theater and a little furniture, and things of that kind. We would retire the present bonded indebtedness out of what we get to construct the new enterprise, so we would have first mortgage on it. Some of it may be done through the selling of stock, preferred or common stock and the balance we would borrow from the bank. The company has no assets. Except those I have just mentioned. While we are throwing away the building, we are reproducing a plant there which will yield a sufficient amount of money,

not only to pay the interest on those bonds, but also to
422 pay the interest on any stock that may be issued. We are proposing to put up a building there that will cost about $15,000,000, and are going to get also the money to pay these bonds that amount to $1,375,000. We have to borrow enough money to do that and pay off this present bond issue. That could be done if there is enough equity there, if these leases are worth enough.

I said that after I became president I noticed signs of sinking of the building, cracks, depressions, and recessions, strained elevator, changes in the level of the floor, sinking in the floors; also that the theater was never actually closed on account of these matters. No building, room or portion of the office building or hotel has been actually closed yet or put out of use on account of those matters.

Plaintiff's Exhibit 43, the plans, they are in the alternative Scheme A and Scheme B. They are simply tentative. They have not been approved by the board of directors of the Chicago Auditorium Association, but we are finding out what could be done and what it would cost us. We have not adopted any plan until we determine the outcome of this suit. I asked Marshall & Fox to prepare them with the unofficial consent of the board of directors. We kept it off the record purposely, for the same reason we kept the
423 name secret. Scheme A and Scheme B were submitted to the board of directors and to me personally. I have seen them and I think all the board members have seen them. Scheme A contemplates purely a hotel with no theater auditorium. Scheme B contemplates the east half of the lot being improved with a hotel, while the west half of the lot will be occupied by a monumental theater with 2500 seats. That is correct. We have no other plans or projects in mind for improving the premises at the present time. The board of directors simply asked the architects to present to us what they would recommend, and he has recommended to us two plans. We have not acted on either. When I spoke of everything being sacrificed to the Auditorium, what I intended to state was that the whole project was to develop a large audience hall there, and little attention was paid to the office building and to the hotel as was paid to the theater proper. The Auditorium Theater was constructed with the idea of taking care of all big public meetings. I said that it may be that to a certain extent there was a kind of public use or public service in mind when that was built; not entirely

so. It was to a certain extent that this would be a building large enough to take care of all these things, and at the same time bring in a very large source of revenue. On account of its size, we would get a large rental, and while we
424 would be helping the city, we would also make a large revenue to the stockholders. That was told by Mr. Peck to a great many stockholders who invested their money. It was intended to be used both in public service and for private interests.

We have not acted on Scheme A. We necessarily cannot decide on it. We have definite plans. We have two alternative plans and they are to be acted upon as soon as we get a decree from this Court to know whether we can go on with it. We are waiting to see what the outcome of this suit is. One of the plans provides only for a hotel and only a hotel; and not for a theater and auditorium.

The second alternative plan, which does provide a theater, is made with the idea of getting an economic commercial advantage out of the building which includes a theater. Those were our instructions to the architects. Our instructions were to produce something where we would get a benefit, a large revenue, and he produced there a theater as well as a hotel. Our instructions to him were to make the whole building as profitable as possible. Both of these plans contemplate buildings on caissons. I am approximately familiar with the allocation of the present Auditorium structure in relation to the various lessors' interest. Our architect happened to be one of our directors, and he is familiar with the whole situation as to these leases, and he was to have in mind the question of the different
425 interests. We did not give him any instructions on that point, we simply discussed it. We told him to figure out for us something that could be put up there to advantage. He has built a great many large buildings and was quite an expert on it, and we wanted him to get it out for us of his own free will. He knew the different interests, how they were divided. We did not give him any special instructions about considering a new plan of building which would maintain the same relative position as the present building, with respect to the separability of the interest.

About 1907, when I first inspected the building, I noticed the depression in the floor of several feet. At that time it was not as great as it is now, but I noticed there has been some. It was noticeable at that time.

Since that time, I have increased my stock holdings in the company. I don't say as often as I could pick it up. Sometimes when it was offered to me and I had the money I would take it up. I think the first stock I bought was $4 a share. Par is $100. I have paid since them, I think, $7 or $8 or $9 a share. It has had its ups and downs. Sometimes there are five shares. If it is 100 shares you can get a little bit more for it.

The reports of Mr. Greeley, who testified as to the levels of the piers, were brought along as they were made from
426 year to year. I examined the reports of the previous years. We discussed these reports at our meetings. We had our own engineer watch it carefully, and when he saw there was anything he thought was out of the way, he would call our attention to it and have Mr. Greeley go after it again. I never discussed it with Mr. Greeley. I may have met him on the street and talked with him about it sometimes. I instructed our architect to consult him. I think undoubtedly he reported the results of his consultations with Mr. Greeley. He said we must be very careful, to keep a close watch of it, and we are all apprehensive. We did keep a close watch of it and we are still doing so.

We have not yet had any negotiations with the Chapin interests looking towards a settlement of the increased rental under their lease. We have had informal discussions from time to time about settling their interest in the premises. Nothing definite. We have made no arrangements with them.

I stated that we took no formal action on Plaintiff's Exhibit 43, the two schemes for the Capitol Building. We discussed it at a meeting but took no formal action on it. It was called the Capitol Hotel simply to pick a name, to prevent the name of the Auditorium being used, because if it got out that we were contemplating changes or the tear-
427 ing down of the hotel, it would affect the tenants of the building; they would want to move away. It might affect the occupants of the hotel from thinking the hotel was going to be closed. We kept it as quiet as possible on that account. Very frequently in drawing plans in an office, it leaks out, and if the name appears they say the Auditorium is erecting a new building. Therefore we called it the Capitol so no one would know what that building was. When this matter was brought up before the board of directors I think there were probably six directors present out of the seven. My recollection is that I was present, Mr. Hetzler,

Mr. Budd, Mr. Fox, Mr. Rew and Mr. Sawyer. They did not express their disapproval or approval. They told the architect to keep it in mind and improve on it as much as he could from time to time, so that when we got ready to put into execution, whatever plan we did adopt, we would not lose any time on it. No further developments have been made in writing. The majority of the stock have always told me they would support my policy. Mr. Hetzler has frequently expressed himself as being entirely satisfied with the management of the building and would cooperate with me in every way; also Mr. Budd, Mr. Fox, Mr. Rew, Mr. Sawyer. I don't know how much stock Mr. Hetzler represents. Not as much as I have. I do not think I am the biggest stockholder. I think Mr. Slaughter represents the largest interest, over 2500, he and his family. They had them in 1922. Plaintiff's Exhibit 43 was prepared about
the date shown, 1922. It had been under their super-
428 vision for several months. I don't know how many
shares Mr. Budd owned or controlled at that time. I should say four or five hundred shares. He had that many in 1921 and 1922. I think Mr. Rew had two or three hundred shares. Mr. Sawyer hasn't any. I have not conferred with any of the big stockholders on any particular plan except as to the necessity of doing something with this property. I have conferred with a great many on that; with Mr. Ernest A. Hamill, W. J. Chalmers, Charles H. Wacker, and several others, among them William H. Colvin. Marshall Field isn't a stockholder. I think that is about all. I should judge Mr. Hamill had two or three hundred shares, Mr. Chalmers one hundred, Mr. Wacker 50 or 100, I forget which, Mr. Colvin 500. I had approximately 1800. Mrs. Clinch has none. I do not think the total number of shares of the people I have talked to constitute the majority of the stock of the corporation, possibly 40 or 50 per cent.

I have read paragraph 20 in the original bill of complaint in this case. It referred to any improvement which we might put on, and these were some of the plans we were contemplating. These were two of the plans which were contemplated but which had not been finally acted upon. They might not be approved, might be changed before we acted
on them, tentative plans. One of the plans introduced
429 in evidence has an auditorium and the other hasn't, I
think. I told you we hadn't decided on which one we would take. Whatever plan we decided on. When it is stated

in that paragraph that the plans or plan mentioned there constitutes a certain division by percentage over the certain lots owned by the various defendants herein, my judgment would be that those percentages refer approximately to both. I am not an architect so I didn't draw them, but my judgment is that it would apply to both. I could not tell what the proportion of the present building is with respect to the various lots. The architect investigated it with the idea of making the new building conform to it. It did not. He was instructed to follow out as near as possible the conditions that now exist. I gave him no particular instructions, but to follow out as near as possible the present plans of the leases, as the building stood now. I gave no instructions on it, but gave him the plans and leases so that he could map it out himself. I understood he knew his business. I didn't tell him how to draw the plans. He is one of our directors and understood the situation very carefully, and he wasn't given instructions on how to draw the plans, but he was to draw the plans in his own way, bearing in consideration the condition of the leases. We approved both of those plans tentatively. We considered they were both in accordance with our instructions. We have not acted
430 on them officially but tentatively we approved them.

Redirect Examination.

Referring to the cylinders under the stage, about four years ago we had trouble with the ram and had to go to considerable expense in repairing it and putting it in shape. As to the existence of waste space, the construction is such that on those outer rooms on the first few floors, they had to be necessarily large because we had no alternative. We could not spread on the other side on account of the theater wall. Therefore it was useless to make them smaller because you couldn't get two rooms out of it. So that is the waste space I intended to refer to. That would be true on all floors until you get up over the top of the dome of the Auditorium Theater proper.

I recall that on cross-examination I was asked whether the Congress Hotel was not to be torn down. I stated it was not, but that an addition was contemplated. That addition, as I understand, is west of the present building, on Congress Street, and south of the Auditorium, immediately across Congress Street from the west half of the Auditorium Building.

I said the theater had never been closed down because of the necessity of making repairs or changes. As a matter of fact, there have been very extensive structural and other changes carried on the building that did affect the theater. We
431 were careful not to interfere with any shows that were going on, but took advantage of the time when the theater was dark to make those extensive repairs from time to time as required.

As to the availability of this site where the Auditorium Building now stands for hotel purposes, with regard to competitive conditions as they now exist or are in contemplation, the general feeling among hotel men is that an improvement of that kind is beneficial rather than otherwise, especially after the first year or two, after you got going, because it attracts more people in that direction. I mean such things as the new Stevens Hotel. While there are a great many new hotels growing up, which would more or less mean competition, it naturally draws a larger crowd to Chicago, and the last few years more hotels have been erected because there is a bigger demand for them. Years ago, before our banks in Chicago had the large deposits and capital they now have, a great many of these projects of underwriting had to go to New York, and those hotels were overrun. Our banks are now so large that a great deal of the financing is done in Chicago. That, in turn, gives us a better hotel city, better patronage. We have different large conventions and other attractions they are putting on from time to time that fill up our hotels very largely at times. The Auditorium Hotel building as it now exists, is not adapted under the present requirements for hotels of the character to which it is supposed to belong. The capacity is very small. It
432 has deteriorated considerably. The rooms are not attractive as other hotels are, and the building is entirely inadequate for a model hotel at the present time.

In the interview I had with Mr. Malone, Mr. Tuckerman and the other gentlemen, nothing whatever was said by any of them about the civic aspect or uses of the Chicago Auditorium Building. Their attitude was that they wanted to be friendly with us, did not want to be considered unfriendly or be a dog in the manger. The only object in demurring to it was the attitude as to whether they were doing their duty as trustees to the people whom they represented. No other point or objection was raised than the financial return to them. Not the slightest reference was made by them in any

interview with them or their attorneys to the supposed public or civic aspects of this building.

The cylinders under the stage gave trouble about four years ago. It was the ram. There seemed to be a depression there, which caused the ram to jump out of place. We had to shut down temporarily and fix it, I should say for several days. That was the only serious trouble. We have to watch it all the time. These are the cylinders I spoke of yesterday as being hydraulic.

433 I have spoken about the Chicago Civic Opera Company being compelled to acquire and use large storage facilities outside of the Auditorium Building. In the World's Fair year there was a great dramatic production put on. That was before my time. Coming down to my time, the dramatic productions and the opera that have used the auditorium have had storage facilities outside, back in 1906 and 1907, because the storage capacity, as I stated, is inadequate. That has been so far at least twenty years, but it gets more so as these shows are larger and require more room.

I had a letter from Mr. Insull about the Civic Opera lease. The letter now shown me by Mr. Fisher is the letter I referred to. There are no other papers except the original lease made in 1917 and the letter or supplemental agreement I hold in my hand. The original lease of 1917 covered the previous opera company.

I have testified that conversations with Mr. Malone and the Trustees of the Sears interest no mention wash made by them of any civic interest on their part in this undertaking. Nothing was said in any of those conversations about it.

434 In none of those conversations did they ever put forward this public interest question as a consideration, nor in any communication with any of their representatives. In those conversations with the gentlemen at the Chicago Club and Mr. Boyden and Mr. Kales, there was something said about litigation. It was stated in case we could not agree, that we would have to bring a suit in equity, which we all assumed would be a friendly suit more to clear up their attitude, more to justify what was done than the talks represented.

The Court: Did those gentlemen in those conversations say what they intended to do if you went forward with your plans to tear down the building and put up another building?

The Witness: They said they wouldn't give their consent.

The Court: Was that all that was said?

The Witness: And that the only thing for us to do, the agreed thing to do, was to bring this suit to test the rights of the two parties.

The Court: Q. Was the possibility of your going ahead without bringing a suit discussed? Did you enter into any discussion with them as to what they would do if you went ahead without bringing a suit?

The Witness: Well, I think—I am not quite as clear, perhaps, as I might be on it, but I think the question was brought up in this way: They said if we would start to tear
435 down it would just mean they would get out an injunction, and we could not afford to tear down—

The Court: Who said that?

The Witness: I think Mr. Boyden and Mr. Adams, in their discussion, stated "Well, it would mean an injunction," and we could not afford to take that chance, so we had to start this suit to determine our rights.

The Court: This was a conversation largely among lawyers?

The Witness: Yes, that is correct.

The Court: You were one of the audience?

The Witness: Yes, I was one of the audience.

The Court: Did you participate in the conversation?

The Witness: Yes, I did.

The Court: But of the legal phases of it, who were the participants?

The Witness: The participants were Mr. Adams and Mr. Malone, I think he is a lawyer, Mr. Kales and Mr. Boyden.

The Court: What I am trying to get at is whether there was anything said on the subject of their consent or their opposition to your plan to tear down this building and put up another building.

The Witness: Yes, it was. They stated that would not let us do it.

436 WILLIAM WESLEY GILKENSON, a witness on behalf of Plaintiff, testified as follows:

Direct Examination.

I live in Chicago and have resided in the City between six and seven years. Am a public accountant with Arthur Young & Company, accountants or auditors for the Chicago Auditorium Association. They have covered in their audits for the Association the whole period since it was organized. I have examined the books and records in which the accounts of the Chicago Auditorium Association are kept and am familiar with what they show. I was in contact with a representative of counsel on the other side of this case when they were examining the accounts. The opposing counsel in this case had an accountant who has gone through these books and records and I was present at such times as he desired for the purpose of discussing and explaining any thing that might not otherwise be clear. The document now handed me is a financial statement which I made up showing a summary of the profit and loss and surplus of the corporation from 1889 down. The statement was prepared showing the revised depreciation and the final net results and it shows the present surplus November 30, 1923, which is an actual deficit. It is a summary of the profit and loss and surplus for the years 1889 to 1923, both inclusive.

437 (Said document was offered and received in evidence as Plaintiff's Exhibit 44 and is as follows:)

SUMMARY OF PROFIT AND LOSS AND SURPLUS FOR YEARS 1889 TO 1923, INCLUSIVE

	Profit or Loss per Audit Reports	Surplus Adjustments		Net Increase or *Decrease* in Surplus	Depreciation as Charged	Net Increase or *Decrease* in Surplus with Depreciation out	Depreciation as Revised in 1919	Net Increase or *Decrease* in Surplus with Revised Depreciation Charged	Accumulated Surplus or *Deficit*
		Debits	Credits						
1889	$17,563.51			17,563.51		17,563.51		17,563.51	17,563.51
1890	44,145.16			44,145.16		44,145.16	82,503.80	38,358.64	55,922.15
1891	45,740.71			45,740.71		45,740.71	86,951.51	41,210.80	97,132.95
1892	5,046.63			5,046.63		5,046.63	86,951.51	91,998.14	189,131.09
1893	231,039.05			231,039.05		231,039.05		144,087.53	
		34,866.00*		34,866.00*		34,866.00	86,951.52	34,866.00*	79,909.56
1894	28,201.79			28,201.79		28,201.79	86,951.52	115,153.31	195,062.87
1895	28,597.25	19,346.50		47,943.75		47,943.75	86,951.52	134,895.27	329,958.14
1896	14,686.96			14,686.96		14,686.96	86,951.52	72,264.56	402,222.70
1897	8,240.94			8,240.94		8,240.94	86,951.52	95,192.46	497,415.16
1898	3,312.49			3,312.49		3,312.49	86,951.52	83,639.03	581,054.19
1899	9,276.33			9,276.33		9,276.33	86,951.52	77,675.19	658,729.38
1900	18,496.60	51,893.02	19,355.77	14,040.65		14,040.65	86,951.52	100,992.17	759,721.55
1901	18,898.89	29,363.37	2,085.00	8,379.48		8,379.48	86,951.52	95,331.00	855,052.55
1902	30,396.54	2,825.00		27,571.54		27,571.54	86,951.52	59,379.98	914,432.53
1903	41,383.90	7,655.26	20.00	33,748.64		33,748.64	86,951.52	53,202.88	967,635.41
1904	13,513.24		604.14	14,117.38		14,117.38	86,951.52	72,834.14	1,040,469.55
1905	52,813.38	2,709.74	7,700.36	57,804.00		57,804.00	83,777.45	25,973.45	1,066,443.00
1906	58,231.07	2,711.75		55,519.32		55,519.32	82,507.64	26,988.32	1,093,431.32
1907	13,736.20	351,470.91	7.72	337,726.99	341,341.93	3,614.94	82,507.64	78,892.70	1,172,324.02
1908	15,806.13	1,100.00		14,706.13	15,054.86	29,760.99	82,507.64	52,746.65	1,225,070.67
1909	21,593.52	.01	50.00	21,643.51		21,643.51	82,507.64	60,864.13	1,285,934.80
1910	36,888.22	7,498.00		44,386.22		44,386.22	97,077.16	141,463.38	1,427,398.18
1911	19,290.58	4,127.28	3,273.94	20,143.92		20,146.92	105,729.17	125,873.09	1,553,271.27
1912	39,194.23	1,196.15		37,998.08		37,998.08	106,638.33	68,640.25	1,621,911.52
1913	34,185.36	7,823.95		26,361.41		26,361.41	106,682.41	80,321.00	1,702,232.52
1914	24,096.57			24,096.57		24,096.57	107,529.06	83,432.49	1,785,665.01

1915	28,585.54	22.00		28,563.54		28,563.54	108,226.99	*79,663.45*	*1,865,328.46*
1916	47,873.03	70,392.41		*22,519.38*	70,000.00	47,480.62	108,264.06	*60,783.44*	*1,926,111.90*
1917	19,153.51			19,153.51		19,153.51	108,084.06	*88,930.55*	*2,015,042.45*
1918	*11,589.99*			*11,589.99*	27,619.27	16,029.28	108,041.79	*92,012.51*	*2,107,054.96*
1919	*4,302.02*	2,215,890.04		*2,220,192.06*	2,323,931.83	103,739.77	108,041.79	*4,302.02*	*2,111,356.98*
1920	*12,266.20*		3,043.44	*9,222.76*	97,790.84	88,568.08	97,790.84	*9,222.76*	*2,120,579.74*
1921	*45,186.40*	70.00	709.21	*44,547.19*	94,890.03	50,342.84	94,890.03	*44,547.19*	*2,165,126.93*
1922	*30,260.34*		765.00	*29,495.34*	94,670.05	65,174.71	94,670.05	*29,495.34*	*2,194,622.27*
1923	440.18			440.18	91,161.90	91,602.08	91,161.90	440.18	*2,194,182.09*
	$ 579,164.72	2,810,961.39	37,614.58	*2,194,182.09*	3,156,460.71	962,278.62	3,156,460.71	*2,194,182.09*	

Deduct: Depreciation credited direct to Asset Accounts—		
Buildings		$ 305,571.75
Equipment		26,224.95
Parlor Floor Alterations		6,324.31
Tripartite Agreement		63,484.13
		$ 401,605.14
Balance, Reserve for Depreciation, October 30, 1923		$2,754,855.57

*Dividends.

439 The Association, like many other corporations, did not recognize the actuality of the depreciation in previous years. Income taxes confronted them like many others. In 1919 the depreciation was computed for all prior years during the life of the Association and an adjustment was made at that time. This report takes the figures as shown by the books and allocates to the respective years the depreciation that should have been charged in those years.

The first column is the year. The second column is the profit and loss, taken from the audit reports of Arthur Young & Company. The third and fourth columns are the surplus adjustments, these debits and credits, and the fifth column is the net increase or decrease in surplus as shown by the books themselves. The next column is depreciation as charged on the books which, of course, takes up that big item of depreciation in 1919, which is an adjustment for all prior years. The next column is eliminating all depreciation that was charged on the books. The next column shows the depreciation that should have been charged if they had charged in the respective years, and the next to the last column is the net increase or decrease for each particular year, and the final column is the accumulated deficit over the year.

The depreciation, so-called, that has been charged by this corporation is not reflected in any way in their accounts as an asset, because they have a big deficit all along. When the depreciation is charged off year by year it does not mean that there were any assets to offset that depreciation;
440 there is no fund set up to represent that charge. A profit is shown in 1893 and a very slight one in 1923, but in all the other years the operation showed the losses indicated in the next to the last column on the statement. There is an item in 1893 of $34,866.00 shown as dividends which is the first, last and only dividend ever declared or paid by the Association. This statement stops at the end of the fiscal year of 1923, but there has been an audit for the following year ending November 30, 1924, of which the paper I now produce is a copy.

(Said document was offered and received in evidence as Plaintiff's Exhibit 45 and is certified herewith as a part of the record)

441 The year ending November 30, 1924 resulted in a net profit of $13,787.51, which would decrease by that amount the net deficit shown on the previous statement. In order to bring the Plaintiff's Exhibit 44 down to date certain figures

should be added at the bottom of various columns. In the profit and loss there would be added $13,787.51. Under surplus adjustments there were no debits or credits for that year. The increase or decrease for surplus for the whole period would be $2,180,394.58, and the total at the bottom of the profit and loss column would be increased accordingly, giving a total of $592,952.23. The depreciation as charged amounts to $88,185.21, making the total depreciation at the foot of this column $3,244,644.92. The net increase or decrease in surplus, with the depreciation out, in the next column would be $88,185.21, the amount of the depreciation charged and the total at the foot would be $874,093.41. In the next column, being the depreciation as revised in 1919, it would be hardly applicable now, because depreciation is being charged on a true basis at the present time, so that it would be the same amount, $88,185.21 being added back. This depreciation is figured on the basis of a certain percentage of the original cost.

The Court: In estimating the depreciation, did you give any estimation whatever to the element of cost to reproduce?

The Witness: Not as a basis for deficit.

The Court: What I have in mind is this: When you speak of a building, or any other property, depreciating, we know that those who did build houses, for instance in 1914,
442 today have a house that is worth twice as much as it cost them. No real depreciation, although there may be a paper depreciation. I just wanted to get just what you took into consideration.

The Witness: Of course, there is the other factor involved in a house of that sort, appreciation of the lot on which the building stands.

The Court: I am just talking of depreciation. Due to the large increase in building prices in the last few years, there are buildings that were put up ten or fifteen years ago that are worth more than when they were constructed.

The Witness: Of course, in business houses, there is the additional element of obsolescence.

The Court: But this is based on the original cost.

The Witness: Yes.

The Court: What percentage did you take than on?

The Witness: It varied, of course, with the class of assets. On the building it was 2½.

In the next column there would be a black figure of $13,787.51, reducing the total for that column to $2,180,394.58,

and the effect would be to reduce the net surplus in the last column to $2,394,058.00.

I made a special analysis of the operation of the theatre from December 9, 1889 to August 31, 1907, from which I was able to determine the general character of operations of the theatre for that period. I examined the whole period, but made up formal statements of the first year of operation and of the World's Fair year and of the last year of operation under management of the Association before the theatre
443 was turned over to the lessee. From the transaction booked the policy of the management seems to have been to have a hall sufficiently large for entertainments political, musical and religious. There would be grand opera, light opera, singing clubs, the Theodore Thomas orchestra and other orchestras, organ recitals, concerts, oratorios, the Apollo Club and Glee Club concerts, meetings of political parties, lectures, and meetings and benefits for various religious bodies (besides numerous other activities mentioned by the witness). The production known as "America" occupied the theatre from April 22, 1893 to November 11, 1893, a total of 253 performances. As to the financial arrangements between the Association and the users of the theatre, some of the companies were operated on a percentage basis, the house and the company each getting a certain proportion, and other engagements were on a flat rental basis. For the two years after installation of the organ, the gross receipts in 1891 from the recitals and rental of the organ to people occupying the theatre amounted to $5,251, with expenses of $3,608, leaving a net profit of $1,643 that year as against a net profit of $493.80 for the following year. In connection with the organ recitals the expenditures by the Chicago Auditorium Association would be for the organists and frequently a soloist. The Association paid the organists and incidental expenses and got the net proceeds. In the case of other entertainments in the theatre, the Association paid the incidental expenses, such as ushers, stage carpenters, electricians, door-men, and box office men, and at times paid for advertising expenses. On certain productions which were on
444 a percentage basis they extended quite large sums for advertising. Mr. Milward Adams was on a straight salary paid by the Association. The formal opening of the theatre was December 9, 1889. From then to December 31, 1890 the net profits for the theatre were $90,307.81; that is

for the theatre as a unit before any general expenses from the books of the Association had been charged against it. The expenses paid by the Association in connection with the management of the theatre included such things as salaries, wages of door-tenders, box office, electricians, ushers, check room, stage hands, carpenters, orchestras, newspaper advertising, printing, bill posting, light, etc. The net profit from the operation of the theatre for the World's Fair year ending November 30, 1893 was $294,227.79 before the charges on the Association books. That was the most profitable year in the history of the theatre. For the period of nine months from December 1, 1906 to August 31, 1907, which was the last year of operation of the theatre directly by the Association, the profit was $27,094.90.

Cross-Examination.

From 1890 to 1907 the principal sources of income were rents for space, stores and offices, in the office building, income from the theatre, rent of the recital hall, admission fees, observatory rents from the Auditorium Hotel, and interest on some securities. The theatre income from 1890 to 1907 was partly on the basis of a percentage of the receipts of the companies and partly on a rental basis. The observatory
445 receipts in 1890 amounted to $29,836.55 and at the present time they are nothing. I think the pipe organ was installed in 1890 or 1891. About the World's Fair time there was some arrangement by which the Chicago Auditorium Association received a percentage of the profits of the Auditorium Annex, now the Congress Hotel. In 1909 for one year the Association owned a little stock of the Congress Hotel, on which it received dividends and it received interest from time to time on surplus funds, including bank interest. These funds were on occasions invested in securities.

(The audit report of Arthur Young & Company for the period ending November 30, 1900 was called for and produced and marked for identification "Defendant Willing's Exhibit 1.")

That is a report of Stewart & Young, predecessors of Arthur Young & Company, covering the period from January 15, 1887 to November 30, 1900. I have examined it and believe it to be full, true and correct. In preparing reports, we generally examined the leases from the Chicago Auditorium Association to its subtenants. I do not recall finding any

leases where no rent was payable. If the rooms were occupied they were leased to some tenant paying a cash consideration. The drug store at the corner of Wabash Avenue and Congress Street is occupied under a lease to the Home Drug Company at $1,358.83 a month, if I remember correctly. I believe there was a lease on rooms 20 to 25 in the office building expiring December 31, 1929 and a number of leases for one and two years and occasionally for five years in the store building. With the exception of the store rooms and a few others the leases have been running from year to year.

The balance sheet of the Chicago Auditorium Associa-
446 tion as of November 30, 1924 shows a surplus deficit of $2,180,394.58. This deficit is not all due to depreciation. You cannot contribute it all to any one class of expense. Depreciation is an expense as much as any other factor. In some years other than those in which depreciation was figured there was a deficit in operating expenses. There was such a deficit in 1889, 1892, 1894, 1895, 1896, 1897, 1900 and 1901. The total income of the Association for 1901 in accordance with our report was $18,898.89 profit. Surplus adjustments including items such as bad debts, etc. changed that figure to a net deficit of $8,379.48, which would represent a decrease if the Association had a surplus, but under the circumstances it merely increases the deficit. In the deduction there is included $14,540.00 for loss of securities, $2,560.74 as a deferred charge written off for lake front improvements, $6,400 for bad debts, and two items of $1,253.90 and $408.73 for sundry expense adjustments. When I speak of an operating deficit I do not mean an absolute operating deficit; I mean it includes the items I have just mentioned; you might take exception to this and say a bad debt is not an operating expense. Our accounts are shaped up to include bad debts and I would have to analyze them to figure the deficit when such items were excluded. It was in 1919 that the surplus account was revised by charging off depreciation for prior years. The charge against surplus for that year on account of accumulated deficit was $2,223,931.83, which purports to cover the depreciation that proper bookkeeping would have shown on the books
for all the previous years. Up to that time the books did
447 not show a surplus deficit but instead a surplus of $108,835.08, I believe. On the building we set up a rate of 2½ per cent for depreciation, on the theatre, furniture and fixtures 6 per cent, on rehabilitation account 5 per cent, on laundry equipment 8 per cent, and on parlor floor alterations

10 per cent. The figure taken as the original cost of the building was $3,057,472.79 as the cost of the building alone. The other figure of $3,299,664.07 included furniture, fixtures and other equipment. The figure of $3,057,472.79 represents the cost of the Auditorium Building as shown on the books, but the books were decreased by an arbitrary depreciation charge of $305,571.75 in former years. One year they had very good profits which were credit to the property account instead of being carried to a reserve for depreciation. The book figure on the leasehold and building account is $2,761,-927.04. I have seen the table on page 28 of the Bill of Complaint, paragraph 17. The figures which I have mentioned as having been deducted from this gross amount do not appear there under "Depreciation". Those figures on page 28 of the Bill do not correspond with the table which I have produced and they are in certain respects incorrect.

Mr. Fisher stated to the court that he had intended to call the court's attention to the differences between the figures set up in Bill of Complaint and the later figures, which on more careful analysis of the accounts have ben found to be the correct ones.

The Witness: The figure of $51,883.75 shown in the
448 Bill as charged off for depreciation consisted principally of a bad debt item of $51,779.05 and is not depreciation at all. The item of $70,000.00 in 1916 consists of a depreciation of $31,115.96 on certain fixed assets and an item of $38,-884.04 written off on account of the Tripartitie agreement consisting of the cost of the tunnel and approaches between the Auditorium and Congress Hotels. All these depreciation items shown in previous years were nullified in the adjustment in 1919. Where a sum is charged off for depreciation in my statement, that includes depreciation on equipment, furniture, fixtures, etc. as well as upon the building. The statement does not show the figures of depreciation on the building alone. The depreciation readjustment in 1919 was chiefly occasioned by the Federal Income Taxes. The previous system of bookkeeping would have required the Association to pay an income tax, but by showing the depreciation the income tax, roughly speaking, was avoided. The Association has not paid an income tax in the last two or three years. The rate of 6 per cent on theatre furniture and fixtures has operated to charge off an amount sufficient to fully depreciate the furniture and fixtures in the theatre, so that at present they are carried on the books with the original cost

wiped out. I could not state whether they are still in use, because the theatre is now leased and in many instances the original property has probably been replaced. The 8 per cent depreciation on the laundry equipment has practically taken up its entire cost. I do not know whether this equipment
449 is still in use, but I found no item for cost of new laundry equipment in recent years. It has been the policy of the Association to hold down the new equipment cost. As to the annual 10 per cent depreciation on parlor floor alterations, that is not a true asset but merely a deferred charge of expenses. It could have been charged off in the year it was incurred of being deferred over a period of ten years. That has been completely wiped out now and there is no asset to represent it, unless you call an alteration an improvement. The depreciated cost value of $457,226.30 on building and equipment would be completely written off in a very few years at the present rate of depreciation, approximately in five years. The productive life of the building and equipment will be theoretically at an end; that is to say, the depreciation will be complete on the books. It is probably correct to say that approximately two-thirds of the deficit now shown by the books was sustained during the first seventeen years of operation; that between 50 and 65 per cent of the total depreciation took place during the first fifteen to twenty years of operation. For the fiscal year ending November 30, 1919 the gross departmental income was $332,037.19; the total expenses before depreciation were $228,297.42; the net income before depreciation was $103,739.77. The depreciation charged off in 1919 was $108,041.79. The depreciated cost value on building and equipment of $457,226.30 was not in 1919, but at the end of the fiscal year 1924.

450 For 1920 the total gross income was $338,692.17; the expenses including all deductions except depreciation were $253,167.53; the net income before deduction of depreciation, $85,524.64; then from that we deducted $97,790.84 depreciation.

For the fiscal year ending November 30, 1921 the gross income was $315,673.16; total expenses including deductions except depreciation, $265,969.53; net income except deduction for depreciation, $49,703.63.

For 1922 the gross income was $362,067.14; expense except depreciation, $297,654.43; net income except for depreciation, $64,409.71.

For 1923 the gross income was $405,875.67; deductions ex-

cept depreciation $314,273.59; net income except depreciation, $91,602.08.

For 1924 gross income, $427,828.24; total expense except deduction for depreciation, $325,855.52; net income except depreciation, $101,972.72.

The money deducted on the books for depreciation was not actually set aside in a sinking fund. The books showed net operating income of $101,972.72 in 1924 and the other sums for previous years back to 1919, but I cannot answer the question what was done with these sums; I don't know that it was in the form of money. The Association had on hand November 30, 1924 securities of a book value of $367,529.43, mostly liberty and government bonds, and cash amounting to ap-
451 proximately $160,000. The balance sheet of that date shows entire current assets of $575,843.84. The books showed current liabilities of about $45,000.00 and there was also a liability for the 1924 taxes which had not been taken up on the books and of which 11/12 for the first eleven months of 1924 would be approximately $144,000.00. The item of $45,000.00 does not represent interest on bonds nor accrued ground rent. There is one month's ground rent that is not included in the account amounting to $6,500.00. I imagine the $45,000.00 is a fair average for a current expense account. There is a net increase in the quick assets of the corporation during the past six years of about $496,952.55 excluding all fixed assets. There is a good reason for this. The policy of the management has been, instead of bring up the equipment as they went along, to hold out in the matter of spending large sums, which would be taken out of these current items. The policy has been to hold back on these additions to fixed assets and it has been reflected in the current assets. The books show a rather substantial increase in the rentals received from tenants during the past few years throughout the building.

During the past few weeks Mr. Hugh N. Smith, a certified public accountant, worked to some extent on the books of the Chicago Auditorium Association and on reports made by my firm at the same time that I was working there. He was there as the representative of some of the defendants in this case and he prepared a report of his investigations from 1889 to 1924. I have looked over this report and examined it in a
452 general way. The figures were taken from audits of Arthur Young & Company, but I have not compared them to see whether they are all correct. I believe that they are

correct as taken from our reports. There has never been a time when the books showed interest on bonds as unpaid, nor when taxes have been unpaid except possibly the current taxes. For the year 1923 under general expense there is a legal expense item of $5,878.91, in 1922 a similar item of $612.90, and in 1924 a similar item of $20,198.34.

Redirect Examination.

In addition to the leasehold interests in the ground, the building and the furniture and equipment, the assets of the Chicago Auditorium Association consist of the current assets such as cash and securities. These securities on November 30, 1924 were $575,843.84 against which there are $45,000.00 of current liabilities and $144,000.00 representing 11/12 of the 1924 taxes. There is also one month's instalment on the ground rent and the accrued interest on bonds. The figures I have in front of me would leave a net worth of $825,466.96, being all fixed assets of every kind including what may remain undepreciated of the building itself. Of that figure the undepreciated value of the building is $394,995.89 as of November 30, 1924. All of these figures are of that date. The undepreciated value of the other assets would be approximately $62,000.00. Excluding fixed assets the net current assets would be $368,240.66, which would represent aside from the building and secondhand furniture and stuff that is in
453 it, the total net result of all these years of operation by the corporation.

It was my impression that the corporation paid an income tax last year. Mr. Clinch in answer to a question stated that the Association had no income tax to pay last year and Mr. Cooper said he would accept Mr. Clinch's statement.

The Witness: The depreciation charge of course is an actual factor of cost. The very fact that the productive life of the property is diminishing would indicate that it is a cost and does affect the financial operation. As the building is depreciated year by year, it represents an actual decline in value of the building and a consumption of its productive life. The only way this appears in the financial accounts is in showing a loss of the fixed assets to those who own them. Depreciation is a real thing, because the productive life of a building is gradually disappearing. That is what depreciation represents. There has been no sinking fund maintained for retirement of the oustanding bonds; no entry of that kind ever

made on the books. The Trust Deed called for $20,000.00 a year to be set aside for that purpose, beginning February 1, 1902. Had these sums been put into a sinking fund, it would amount February 1st, 1925 to $480,000.00, which has not been set aside. Apart from the building itself and its furniture and equipment, the securities and other assets on hand would not be sufficient to offset that fund. I said that the explanation of the recent increase in quick assets so that the com-
454 pany had not been making replacements and renewals during recent years. There are no charges to the property accounts during that period and the only charges in the nature of expenses for property accounts are those now carried in operating expenses, which would be current reports and items of that sort.

Re-Cross Examination.

I find no record of foreclosure proceedings under the bond issue by reason of the non-availability of this sinking fund. Some of the original bonds were paid off. The sinking fund to which I refer is under the consolidated mortgage. These bonds were to liquidate the first mortgage, but only a few bondholders under the first mortgage availed themselves of it. None of the $225,000.00 worth of first mortgage bonds that have been paid were retired under the sinking fund provision. The $144,000.00 mentioned on account of taxes was accrued November 30, 1924, not payable until the next April. After an asset has been fully depreciated, the Federal Income Tax would not permit any further depreciation or deduction on that account. On the assumption that the property is still in existence and under the same conditions, the fixed assets of the Auditorium would be fully depreciated within five years under the present system and, roughly speaking, the income tax authorities would consider that the Association was making a taxable income of about $100,000.00 a year. As to assets which have been fully depreciated, it is true that
455 if they have been replaced from time to time by repairs, replacements, etc. and are still in use, they remain an asset and except for bookkeeping purposes, have a real value.

Re-Direct Examination.

If articles are replaced by the Association from time to time, it would depend upon equipment itself whether they are

charged up at a rate of depreciation established on them from the date of purchase. If it was equipment or anything of a large nature which would last over a period of years, it would naturally decapitalize. In case of a small item, like dishes and other breakable things, they would in all probability let the original capitalization stand and charge the replacements to expense. Where any substantial addition has been made in the way of equipment, it would be capitalize and a rate of depreciation established upon it.

Re-Cross Examination.

I do not recall that any substantial additions in the way of capital expenditures have been made during the last five or six years. The capital accounts have not changed substantially for a good while. There have been minor changes during the past ten years. When the Chicago Auditorium Association took over the operation of the Hotel, it was fully
456 equipped by the Association, which purchased the furniture and fixtures already in the Hotel and in addition spent quite a large sum to bring the equipment up to standard. That was, I think, in 1909. Minor expenses for replacements during recent years have been charged to expense. Exclusive of the World's Fair year, the only years showing a profit are 1923 and 1924 after deducting depreciation. In one year they charged off $51,000.00 for bad debts and if that was excluded, it would make quite a difference in the figures. If legal expenses were excluded, the year 1924 showed the most profitable year of the Association since the World's Fair, but I cannot see why an item like legal expenses should be excluded. It is true, as shown by the books, that 1924 was the most prosperous year without allowing for legal expenses and depreciation and other things that might be suggested. That year is apparently most prosperous, and I should be inclined to say that it was really the most prosperous. My testimony is based on the books. Even if the $51,000.00 had not been deducted in 1910, that year would probably not have been as profitable as 1924, though I would have to go into the books to know what items were excluded. Adding $51,000.00 for 1900 it would not be shown by the books to be as profitable as 1924.

457 PLAINTIFF'S EXHIBIT 46. Plaintiff's Exhibit

Wabash Avenue.

15. The southwest corner of Wabash and Jackson, 40 feet on Wabash by 109 on Jackson, was conveyed by the Connecticut Mutual Life Insurance Company to Albert J. Averill March 21, 1881 for $32,500.

32. The northwest corner of Wabash and Van Buren, 90 feet on Wabash by 120 on Van Buren, was conveyed by B. P. Hutchinson to William C. Labenstein May 3, 1881, for $70,000.

133. On the west side of Wabash 40 feet north of Congress, 40 feet by 120 feet deep was conveyed by Lawrence S. Pepper to John Q. Adams August 27, 1886, for $26,000.

65. On the east side of Wabash, about 107 feet south of Van Buren, 33¼ feet by about 171.5 feet deep, was conveyed by Albert Crane to Robert D. Sheppard October 3, 1885, for $47,500.

68. On the east side of Wabash, about 140 feet south of Van Buren and 80 feet north of the Auditorium site, 20 feet by about 171.5 feet deep was conveyed by Benj. P. Hutchinson to Samuel W. Packard July 6, 1883, for $31,000.

116. On the east side of Wabash immediately north of the Auditorium site, 80 feet by about 171.5 feet deep was conveyed by the Connecticut Mutual Life Insurance Company to William A. Giles April 5, 1884, for $130,000.

142. On the west side of Wabash 144 feet south of Congress, 48 feet by 165.5 feet deep was conveyed by Percy W. Palmer to Ezra McCord March 15, 1886, for $80,000.

157. On the east side of Wabash 80 feet north of Harrison and about 280 feet south of Congress, 40 feet by 172.5 feet deep was conveyed by Virginia B. Holmes to Lester H. Eames November 14, 1883, for $32,000.

Michigan Avenue

45. On Michigan Avenue 120 feet south of Jackson 40 feet by 171 feet deep was conveyed by James K. Fisher and others to Warren F. Leland July 22, 1886 for $34,000.

60-61. On Michigan Avenue 126 feet north of Van Buren, 30 feet by 171.5 feet deep was conveyed by Silas B. Cobb to James W. Masury June 1, 1881 for $12,000 and on the same

date the 25 feet next south was conveyed by Daniel B. Shipman to James W. Masury, for $10,000.

71. The southwest corner of Michigan and Van Buren, 54 feet on Michigan by 171.5 feet on Van Buren, was conveyed by Albert E. Kent to Charles L. Hutchinson January 23, 1882, for $45,000.

74. Sublot 13, fronting 26.66 feet on Michigan Avenue with a depth of 171.5 feet, located 106.66 feet north of the Auditorium Property, was conveyed by Jessie Bross Lloyd to Studebaker Bros. Mfg. Co. November 2, 1885, for $25,000.

458 75. Sublot 14, fronting 26.66 feet on Michigan Avenue with a depth of 171.5 feet, located 80 feet north of the Auditorium Property was conveyed by the heirs of P. F. W. Peck to Studebaker Bros. Mfg. Co. June 12, 1885, for $16,666.67.

77. Sublot 15 fronts 26.66 feet on sublot 17 fronts 26.67 feet on Michigan Avenue, with depth of 171.5 feet. Sublot 17 adjoins the Auditorium Property, and sublot 15 is 53.34 feet north of the Auditorium Property. Both were leased by Emily C. Lyon to Clement Studebaker, et al, May 12, 1885 for 99 years at $2,000 per annum, being $1000 for each lot.

84. Sublot 16, fronting 26.67 feet on Michigan Avenue by 171.5 feet and located 26.67 feet north of the Auditorium Property, was leased by Tuthill King to Clement Studebaker, et al, May 12, 1885, for 99 years at $1,000 per annum.

90. Sublot 18, being 26.67 feet by 171.5, part of the Auditorium Property, was conveyed by Patrick J. Sexton to Studebaker Bros. Mfg. Co. September 19, 1885, for $30,000.

95. Sublot 19, being 26 feet by 171.5, part of the Auditorium Property, was conveyed by the Trustees of John L. Clarke, et al, to Studebaker Bros. Mfg. Co. March 6, 1886, for $30,000.

151. On Michigan Avenue about 60 feet south of Congress, 26 feet by about 110 feet deep was conveyed by Ephraim Morris to Charles W. Fullerton November 18, 1885, for $11,500.

153. On Michigan Avenue about 86 feet south of Congress, 26 feet by about 110 feet deep was conveyed by Orrington Lunt to Frank A. Helmer March 10, 1884, for $9,500.

459 PLAINTIFFS EXHIBIT 46-A. Plaintiff's Exhibit

1.

The Fine Arts Building, adjoining the Auditorium on the north, was sold in April 1915, by the Corporation of the Fine Arts Building to the trustees of the estate of Charles A. Chapin, together with the fee of that part of the Auditorium site covered by the so-called Studebaker leases. The property fronts east on Michigan Avenue 186 feet with a depth of 171.5 feet. The north 133.33 feet is improved with the Fine Arts Building erected about 1888, and the south 52.67 feet is subject to leases for 99 years to the Chicago Auditorium Association, and is occupied by a portion of the Auditorium Hotel. The property was sold for $3,000,000, paid in part by transfer of the corner of Van Buren and Sherman Streets at a valuation of $650,000. The Fine Arts Building was put in at a valuation of $210,000, leaving $2,790,000 as the purchase price of the land, equivalent to $15,000 a front foot and approximately $87.46 per square foot.

The Corporation of the Fine Arts Building was controlled by the Studebaker interests, which acquired the property about the year 1885. The north 26.66 feet, known as lot 13, was bought from Jessie Bross Lloyd for a consideration of $25,000 stated in the deed. The next 26.66 feet, or lot 14, was conveyed by the heirs of P. F. W. Peck by deed stating the consideration as $16,666.67. The 26.67 feet known as lot 18, being part of the Auditorium site, was acquired from P. J. Sexton and wife by deed expressing a consideration of $30,000, and in 1886 the 26 feet known as lot 19, also part of the Auditorium site, was acquired by deed from the John L. Clarke estate also expressing a consideration of $30,000. Sublots 15, 16 and 17, each with a frontage of 26.67 feet, were leased to the Studebakers by two leases dated May 12, 1885, each for 99 years from June 1, 1885, at $1000 per annum for each lot. The lease of lots 15 and 17 was from Emily C. Lyon and husband at $2000 per annum, and the lease of lot 16 was from Tuthill King at $1000 per annum.

2.

The property Nos. 324 to 330 Michigan Avenue, fronting east 82 feet on Michigan Avenue about midway between Jack-

son and Van Buren Streets, was acquired by Karpen Bros. in 1903 for $450,000 on a basis of $5500 a front foot, pursuant to an option in a 99-year lease, and was resold in 1910 to the McCormick Estate for $1,148,000, or $15,000 a front foot. The old building on the premises was treated as of no value, and was not considered in fixing the price of the property. The depth of the lot is 171 feet; square foot value is $81.87.

3.

The 53 feet north of and adjacent to No. 2 at 318 Michigan Avenue, with a depth of 171 feet, was leased in 1923 by Karpen Bros. to Leschin's, Incorporated, for 99 years from February 1, 1923, at an annual rental of $40,000 for the first three years and three months, $50,000 for the next ten years, $52,500 for the next five years, $55,000 for the next five years and $60,000 for the balance of the term. On the basis of $50,000 per annum, the rental capitalized on a five per cent. basis would indicate a value of $1,000,000 or $18,886 per front foot and about $110 a square foot; and on a four per cent. basis these figures would be $1,250,000, $23,573 and $137.70, respectively.

460

4.

The southwest corner of Michigan Avenue and Jackson Boulevard, being about 160 feet on Michigan Avenue by about 171 feet on Jackson Boulevard, was sold by Edwin F. Meyer and the Trustees of the Levy Mayer Estate to S. W. Straus in 1923 for $4,063,500, or $25,396 per front foot, figured on the Michigan Avenue frontage. This is equivalent to about $148.48 a square foot.

5.

The property at Nos. 423-9 Wabash Avenue, adjoining the Auditorium property immediately on the north was ground leased by William A. Giles and the Continental and Commercial Trust and Savings Bank to Edward F. Bosley, President of the D. W. Bosley Company, William B. Simpson, President of A. M. Castle & Company, and Frederick T. Hoyt for 198 years from 1912 at the following rates of rental: The first six years at $24,000 per annum, the second six years at $27,000 per annum, and the final 186 years at $30,000 per

annum. The present rental would show a valuation of $600,000 on a five per cent. basis, or $7,500 per front foot.

This property was conveyed in 1884 by the Connecticut Mutual Life Insurance Company to William A. Giles for a consideration expressed in the deed of $130,000.

6.

The 20 feet on Wabash Avenue, 80 feet north of the Auditorium, has a depth of 171 feet. This was sold in May, 1924, by Mark S. Willing, through Gilbert Scribner to the Chapin Trustees for $130,000 cash, being at the rate of $6500 a front foot and $38 a square foot.

7.

The southwest corner of Wabash Avenue and Congress Street, fronting 144 feet on Wabash Avenue, with a depth of about 165 feet was leased in December, 1924, by Philip F. W. Peck and others to the Bensingers for 25 years at a graduated rent, rising from $50,000 to $65,000 per annum. The rent for the first five-year period is $50,000 per annum, being five per cent. on a land value of $1,000,000, or about $6944 on Wabash Avenue per front foot and $42 a square foot; the lessee also paying nine per cent. per annum on the cost of a building to be erected by the Lessors.

8.

The southeast corner of Wabash Avenue and Congress Street, fronting 160.28 feet on Wabash Avenue and 91 feet on Congress Street, was sold by the Chicago Portrait Company in 1908 for $500,000 to Julius Rosenwald, who leased it back to the Portrait Company for 198 years, at five per cent. on the purchase price, or $25,000 per annum. The price was about $3119 a front foot on Wabash Avenue, and $34.34 a square foot. The Portrait Company bought the north 70 feet in 1905 for $180,000, and the south 90 feet in 1908 for $120,000, and erected the Ohio Building on the premises.

The property was sold by Julius Rosenwald in 1911 to the Marshall Field Estate for $625,000, subject to the lease.

461 9.

The property on the south side of Congress Street east of the Ohio Building and across the street from the Auditorium, was leased to the Congress Hotel Company for 99 years from February 1, 1923, at an annual rental of $15,000 for the first two years, $24,600 for the next seven years, and $27,000 for the remaining 90 years. The property fronts 72 feet on Congress Street and is 144.25 feet deep. The average annual rental is $27,042, which capitalized on a five per cent. basis is equivalent to a land value of $540,840, or $7,511 a front foot and $52.07 a square foot.

10.

The 80 feet of east frontage on Wabash Avenue located about 80 feet south of Van Buren Street, and having a depth of about 172 feet is subject to a ground lease commencing May 1, 1906, under which the present rental is $14,000 per annum, or five per cent. of $280,000. This leasehold was sold in 1921 to John R. Thompson for $200,000, making a total of $480,000 for the property with an old building of no value upon it, and fixing a front foot value of $6000 for the land, which was the price agreed upon between the parties. Of the $200,000 paid by Thompson in 1921, $50,000 was cash, and balance was the house at 4415 Grand Boulevard, put in at a valuation of $150,000.

462 JOHN DORR BRADLEY, a witness on behalf of Plaintiff, testified as follows:

Direct Examination.

I have been in the real estate business ever since I came to Chicago in 1894 and am now a partner in the firm of Aldis & Company. We manage the Monadnock and Marquette Buildings and a great many other large buildings in the central business district of Chicago, and I am a Trustee in the Chicago Real Estate Trust, which owns much downtown property. Since 1894 I have been familiar with the character and value of real estate in the central business district. I have had two lists made up, showing the sales of various downtown properties.

Mr. Fisher stated that counsel for defendants had been furnished with copies of these lists and an opportunity to examine them; one consisting of two sheets relating to earlier sales and one of ten sheets relating to more recent transactions.

(Said document showing the earlier sales was offered and received in evidence as Plaintiff's Exhibit 46, and said document showing later sales was offered and received in evidence as Plaintiff's Exhibit 46A, which Exhibits are as follows:

463 Since the Auditorium was erected there has been a very marked change in the district. When I came here in 1894 there were very few buildings of consequence on Michigan Avenue, except the Auditorium. There was the Pullman Building and a few others. East of the Illinois Central tracks there was nothing as the water came pretty well up. Now there is a park running from Randolph Street to Park Row, and half a mile or more has been filled in. The Fine Arts Building and present Chicago Club Building had been put up, but south of the Congress Hotel on Michigan Avenue there was nothing but residences. There were some old residences across on Congress Street from the Auditorium. When I came to Chicago there was an old hotel and apartment building at the northwest corner of Jackson Boulevard and Michigan Avenue, where the Railway Exchange Building now stands. Wabash Avenue was a much better business street than Michigan Avenue, which was at that time almost a back street. At the corner of Van Buren Street were the Victoria and Richelieu, which have both gone and have been replaced by the McCormick Building, a modern, tall, fire-proof building, as good as any in the city. North of it is the Straus Building, just finished, an extremely fine building. Then comes the Railway Exchange and Orchestra Hall, and then the Pullman Building, Peoples Gas Building, Monroe Building, and the University Club. At Randolph Street is the Public Library and from there north Michigan Avenue has within the last few years been widened and carried across the new bridge, so as to make a great artery.

464 It is today the show street of the city. South of the Congress Hotel down to the Blackstone there have been a number of new, tall buildings of modern, steel construction put in. When I came here it was all residences. The widening of Michigan Avenue and construction of the bridge

across the river has made Michigan Avenue the great through street of the city as far north as the Drake.

I have examined the Auditorium Building and have been all over it. The trouble with the building is that it is given up to the Auditorium. It was built before the days of steel construction and has just a narrow margin around the Auditorium. In the lower six stories there are no rooms for the hotel on the inside and above that the rooms are small and poor. The heavy stone work on the lower floors makes it difficult to utilize for mercantile hotel or office purposes. In my opinion, as an expert, the kind of building which should be constructed there is a modern, fire-proof hotel as high as the ordinances allow, with adequate court space. I should tear the present building down. Its construction is absolutely obsolete and I would rather have the land without the building on it than with it, because I should have to go to the expense of removing the present building. In my opinion you would never get income producing property out of the present building.

I have a plat showing the area of each of the five leases involved in this case. In my opinion the combination of all that land under control of the same tenant adds decidedly to the value of the holdings, because you get a large
465 property which can be developed without alleys north and south. I have been engaged for twenty-five years in making long term ground leases and selling property under them from the World's Fair time, or shortly afterwards when I came to Chicago. Ground leases in the Chicago central business district were generally computed on a 4 per cent basis until the World War and now we generally put them on a 5 per cent basis. Before the World's Fair I think there were times when the basis was as high as 5 or 6 per cent. This refers to central, downtown property. I have an opinion on the value of the ground covered by the Auditorium Building in February, 1923. Taking up the first Walker lease at the corner of Michigan Avenue, I put a value on the north 94 feet of $17,000 a front foot and on the south 40 feet, a value of $22,500 a front foot, making a total value of $2,498,000.00 for the fee unimproved and unincumbered. The lease on that property is $15,000.00 a year, which figured on a 5 per cent basis (the current rate now of figuring ground leases) gives $300,000.00, so that there would be an equity of $2,198,000.00 over and above the leasehold interest. In regard to the second Walker lease, I put a value of $6,500

a front foot on the north 80 feet of the Wabash Avenue frontage, and $4,000 a front foot on the 25 feet next south, or $620,000.00 in all. The ground rent, as under the first Walker lease, is $15,000.00 a year, which capitalized on a 5 per cent basis at $300,000.00, leaves an equity of $320,000 in the second Walker lease.

466 The Peck lease at Wabash Avenue and Congress Street is irregular in shape and I have figured its value on a square foot basis. The area is a little over 10,000 square feet and I put on it a value of $50.00 a square foot, making approximately $500,000.00. The ground rent is $14,000, which capitalized at $280,000 would leave an equity of $220,000.00 in the Peck lease.

This would give an equity of $2,738,000.00 in the three leases, and I have disregarded the Studebaker leases because of the revaluation clauses. Leaving the leases out of account, I should value the Studebaker property at $17,000.00 a front foot. There is possibly some discount by reason of the alley running in.

I have looked somewhat into the values of these properties about the time the leases were made, as indicated by sales and other transactions. The Michigan Avenue values at that time ran from about $800 to $1200 a front foot and the Wabash Avenue values from $800 to $1600 a front foot. This was along about 1885, and allowing for such changes as occurred, it seems to me that at the time the leases were made they were a little high; a little higher than the values established by the sales of which I have knowledge. I think the leases are a little high and that the valuation for the ground expressed in them was a little more than the market value at that time. The Peck lease, corner of Wabash Avenue, is the highest relative to the market values of property as shown by the records.

Cross-Examination.

467 Number 116 in Plaintiff's Exhibit 46 on the east side of Wabash Avenue just north of the Auditorium is shown to have been conveyed in 1884 for $130,000.00, which for the 80 foot frontage is about $1600 a front foot. Number 142 on the west side of Wabash Avenue south of Congress Street is about $1600 a front foot. I figured the Wabash Avenue frontage of the Auditorium property in 1887 at $1900

a front foot, which would make $1,208,250.00. Michigan Avenue was worth very much less at that time. The first Walker lease I have figured at about $8.00 a square foot, the second Walker lease at above $12.00 a square foot, and the Peck lease about $19.00 a square foot. That is a little less than the conveyances shown on Plaintiff's Exhibit 46 where you get a maximum of about $1600 a front foot.

These sales have been selected as typical and my information was gathered from a study of figures furnished me and my general information about conditions in Chicago before 1894. I think the list covers about all the sales of property near the Auditorium site which I found prior to 1888 or 1889; there may be a few others. There has been a perpetual increase of values, but I do not know whether the values went up every year. Prior to 1887 I would say on Michigan Avenue properties stood pretty still for a long time. The values increased slightly over a period of five years prior to 1887 and since that time there has on the whole been a perpetual increase. The properties went up during the five years after 1887. Comparing items 75 and 95 in Plaintiff's Exhibit 46, referring to lots in same block, there appears to be a spread of $16,666.00 to $30,000.00 in the same
468 year. I would say that the person who sold the lot in Item 75 did not know what was going on; the other was part of the Auditorium property and the man who bought it knew exactly what it was. Undoubtedly the coming of the Auditorium increased property values in the vicinity, just as the present condition of the Auditorium is holding them down.

By the highest and best use of the Auditorium fee I refer to the commercial aspect of the situation. It is the best place I know of in the city for a very fine hotel. I support the Auditorium is as large and good a theatre as we have at the present time.

In giving figures about values of the fee in February, 1923 I assumed that the fee was unincumbered by restrictions as to its use. Michigan Avenue is much more valuable than Wabash and the fact that there is no alley between helps the value of the Wabash property. I did not take that fact into consideration, but treated the Michigan and Wabash properties separately without considering that they were one property. I expressed my belief that the five parcels taken together had a greater value than if separate buildings had to be erected on each. I cannot make an accurate estimate

of such additional value, but should say 10 per cent. In valuing property, a corner lot is ordinarily put higher than an inside lot. The corner of Wabash and Congress was considered more valuable than the inside lots as was the corner of Michigan and Congress. Item number 68 in Plaintiff's Exhibit 46, sold in 1883, I figured at about $9.00 a square foot; and number 116, sold in 1884, about the same; item number 142 on Wabash Avenue, sold in 1886, about $10.00
469 a square foot. None of those were corner lots. The Walker lease on Michigan Avenue was a corner lot and figured about $8.00 a square foot, and the Walker lease on Wabash Avenue at approximately $12.00. The two together have an area of approximately 43,000 square feet. Michigan Avenue was not nearly as valuable as Wabash. An inside lot on the west side of Wabash brought about $10.00 a square foot in 1886 and the Auditorium property a short distance south was put in at $12.00. That was one of my reasons for saying I thought the leases were rather high at that time. In the lists the improvement are not taken into consideration. We have tried to eliminate them as much as possible. The figures are on the basis of unincumbered fee.

In my valuations of the leasehold interests I figured on the basis that the lessees could use the property as if they owned it, upon paying the ground rent. For the proper commercial development of the Auditorium property the natural thing to do is to build a light, steel constructed building, without much stone at the bottom, so as to get the commercial value out of the stores, probably with a light court above. It is a question for an architect where the court should be, but in a large property like this you are sure to want a court in it.

As I understand it the property is bringing in a very small return. Anybody trying to do anything with that hotel would have to spend an undue amount of money. That was why I said it was better to take this building down than to at-
tempt to do anything with the old building. On the as-
470 sumption that the lease requires the building to be maintained substantially as at present during the remainder of the term, I think the value would be negative; I should not want it under those circumstances. The leaseholds would be worthless if the taxes and expenses go on as now.

Whether or not there would be a large auditorium in the

ideal building for this property is a matter of opinion. I do not believe in large auditoriums as a business investment. If the terms of the lease require an auditorium, I should support the architects could work out an auditorium and the hotel, but I have no definite opinion on that subject.

471 BERNARD H. LICHTER, a witness on behalf of plaintiff, testified as follows:

Direct Examination.

I have lived in Chicago all my life, more than sixty years, and have been engaged in the business of contractor since 1890. I had charge of the masonry construction, foundations, and so forth, brickwork, concrete and walls, of the Chicago Auditorium Building. I was with John Angus. I laid out all of the Auditorium Foundations and the masonry walls, and did the excavation work for the trenches. When I came there Farwell was doing the general excavation, and he had the east end completed and was working toward the west end. I started in and dug down to the proper level as indicated on the plans, and put in the timber, two courses of timber construction, concrete, and then masonry, rubble on top of the concrete. The general excavation might have been about 11 or 12 feet below inside grade. The ground or soil was soft clay. All the trenches on that building were 17 feet below inside grade to the bottom of the timber, except the tower, and the tower was one foot deeper. It must have been below city datum, because city datum is about low water level in certain years. We had to get the timber below water line. Below the top of the sidewalk was 17 feet down to the bottom of the foundations. First we had two courses of timber 12 inches in height and varying in width from 8 to 16 inches. The lowest course of timber was not laid directly on top of the clap. We bedded them in an inch of sand. The clay was uneven, so to get a nice, good bearing
472 we just scattered sand over the clay after we had dug, when we got down to the level, and laid our timber on top of the sand across the trenches. We first laid one course of trenches, 12 inches in height, with various widths, across the trench. The width of the foundation varied. The walls might be 15 feet in width. I know the tower foundation itself was 100 feet by 67 feet 2 inches. That was

the entire width of the timber foundation under the tower. The rest of the foundations for the walls were of various widths. Some were 12 or 13 feet, some were 15 feet on the first ones, something like that, in width. Above this first layer of timbers there was another layer of timber crossing at right angles to the first course. The additional material used in connection with those timbers consisted of seven courses of concrete interlaced with railroad iron. The railroad iron was laid across the upper layer of timbers. The second course was at right angles to the first course of railroad iron. The total amount of this timber and railroad iron and concrete grillage as a whole varied some in thickness. For instance, on mostly all the walls, on all the timber construction, the foundations were two feet in thickness, the timber. On top of that there were two or three courses of concrete. On top of that there was rubble masonry. We went right up to the first floor with the rubble masonry. The walls varied too. The walls themselves, above the floor level, after the offsets had all been made in the footings, were about 2 feet 6 to 5 feet. There were piers in the exterior walls; I think about 9 or 10 on each front, Michigan avenue and Wabash avenue, and on the long front there must have been about 18 or 19 piers. The distances between them varied with
473 the width of the footings. Every offset in the rubble masonry was about a foot in height.

Then we started the wall proper, all of which was supposed to have been laid in brick, but there was a strike on and we couldn't get the bricklayers. We built the rest of the walls, up to the bottom of the first floor, with rubble masonry. The mortar that was used in that rubble masonry was cement mortar. It was a little better than the natural cement.

This clay for foundation purposes was a soft clay, easily shoveled with ordinary shovels. No other tools were used in the excavations except ordinary shovels. There are no caissons nor pilings under the Chicago Auditorium Building. The interior walls were constructed similar to the exterior piers, that is, two courses of timber, this concrete interlaced with railroad iron, and rubble masonry. About the same character as the grillage I have described for the exterior walls. The interior columns were square. They were mostly on the west end; there were a few on the east end. They ran about 10 or 12 feet square. The foundations for each of the columns were entirely separate and distinct from the founda-

tions of any other column. No jack screws were put under the piers, but there were some jack screws put in on the columns on some of the piers so that in case the piers did not settle evenly they could lower the floor under the sidewalk similar. There are jack screws on top of each one of the columns under the sidewalk. They are in there now.

The foundations under the tower were a connected grillage or raft, a complete raft by itself measuring 100 feet by 67 feet 2 inches. That was the first course of timber. Then
474 there was a three-foot offset for the second course of timber on all sides, and then after the masonry was put on the course was offset at each course. For the first seven feet, it was solid, and then we laid out the piers on top of that for the columns. By the way, there were some beams put in there; in the tower there were some steel beams. They were carried from column to column and then from there to the walls on the grillage, and filled in with concrete. We had the plans to work with.

Mr. Fisher: I may say to the Court that we have not been able to locate those plans and os therefore cannot show them.

The Witness: The specifications mentioned borings to determine the character of the soil under the foundations. We made one boring on the Michigan avenue side. When we started on the foundations and got down to the level, Mr. Adler became alarmed that there was not sufficient water to cover the timber, and as we had got down half way for Michigan avenue, he requested me to get a fence auger, and bore a hole between the piers and leave it stand over night, to see whether it would gather any water. I did that. The next morning when Mr. Adler came we looked into it and found very little water. Water was absolutely essential for the preservation of the timbers in the foundation.

In these foundations under the interior columns, the reenforcement was railroad iron, principally. There was a clause in the specification which call for us to make an allowance for settlement, so I asked Mr. Adler one day how much we should allow for settlement. He thought it
475 over for a while, and then said, "I will let you know tomorrow morning." So the next day when he came he said, "We have decided to allow two inches for settlement." That settled it. I brought all the foundations two inches higher then. That is the only allowance made for settlement at that time. That is the only allowance that

was made for the foundation, two inches. In making that boring I saw that the soil ran about even as we struck. When I started to bore, we were then at the bottom of the timber. Then I put an eight foot auger down further, and we had 17 and 8, and that would be about 25 feet down from the sidewalk level. And I found the clay about the same. I found no sand strata. I found little sand pockets of the soil generally in the downtown district in the city of Chicago is a soft clay; then the stiff clay for about 10 to 15 feet, and below that the clay commences to harden until it gets to hardpan. I found on the Burnham Building it ran about 69 feet to the hardpan. The top of the hardpan was about 69 feet below the grade, and this hardpan ran about 8 feet in thickness, and below that I found gravel, sand, water, etc., down to rock. Below the general sidewalk level until you come to bed rock it is about 115 feet.

There has been a decided change made in the character of foundations put in for large buildings built in the city of Chicago since the Auditorium foundations were put in. Shortly after the construction of the Auditorium Building there was a complete change in construction to caisson foundations. That is what they are doing now. Since the construction of that Auditorium Building, there has been a change from masonry walls to steel skeleton walls.
476 That change took place about the year after the Auditorium Building was built. The Tacoma Building was the first one of its kind where they put in the columns in the exterior wall and took off the heavy load of masonry.

Cross-Examination.

There was a testing tank on the ground when I got there. It was about 130 feet west from the Michigan avenue side. It was a tank in which the tests had been made, I understood, by weight of water in the tank on the soil. I understand General Sooy Smith had charge of that, under the direction of the architects, of course. Adler & Sullivan were there most every day.

I think the Masonic Temple, at the corner of State and Randolph, has floating foundations. That was built about the same time as the Auditorium. The Old Colony Building has floating foundations, and Unity Building, and a few others. Some of these buildings were built after the Auditorium. There were caissons put in the Stock Exchange Building,

under the west hall. That was a party wall, and Adler & Sullivan were the architects, and we figures on the contract. We didn't get the contract, but that is how I know. There are some high buildings in the loop district on floating foundations that were built after the Auditorium. I don't know whether the Monadnock Building has got piles or whether
477 it has a floating foundation. I have done some caisson work. There is bed rock under practically the entire loop district. I don't know of any place they haven't found bed rock if they wanted to go down. Oftentimes they down to hardpan, but the city hall objects to that. They don't like hardpan in some districts, and they are very particular about that, and they insist on going down to bed rock. By hardpan I mean this hard stratum that is not very far above bed rock. It is very hard. You can't shovel it out except with an axe and grub pans.

478 THEODORE E. WADE, a witness on behalf of Plaintiff, testified as follows:

Direct Examination.

I have live in Chicago about twenty-five years and am chief engineer of the Chicago Auditorium Association. Have been so employed off and on for twenty-four years. I have had charge of the building as an engineer. There are various points in the structure of the Chicago Auditorium Building where there has been a large settlement, resulting in fractures. I have had photographs made of a number of those points. The photographs handed me are among those taken by me. The one with the number "1" in a circle at the lower left hand corner of the photograph shows an excavation I had made at the southeast corner of the pier under the tower and at the bottom of the excavation it shows the timber grillage toward the background of the lower part of the photograph. The little white spot on the photograph is a piece of paper dropped there by the photographer to get his focus, and in order to show that that paper rests on a footing or offset in the timber grillage.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 47 and is certified herewith as a part of the record.)

The photograph marked No. 2 shows the foundation

alongside of where we made the excavation shown in the ex-
hibit last introduced, and it shows the props that we had
479 to put in under there to keep that from falling down after
the clay had run out from under it. When we made the excavation the clay ran out from under the catch basin.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 48 and is certified herewith as a part of the record.)

The photograph marked No. 3 shows the same excavation, taken from the opposite direction to No. 1. It shows the timbers; also the foundation under one of the interior columns, which is the round upright shown in the upper half of the photograph.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 49 and is certified herewith as a part of the record.)

The photograph marked No. 4 is the same excavation, with the camera pointing directly down on to he top of the timber, perpendicularly down over the trench that we excavated.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 50 and is certified herewith as a part of the record.)

The photograph marked No. 5 is another excavation made on the west side of that same pier, showing one railroad iron. The camera is also pointed down, and the railroad iron would be over the grillage. This photograph shows the foundation pier of the part of the tower; also the concrete reinforced by the iron rail, to which Mr. Lichter referred.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 51 and is certified herewith as a part of the record.)

The photograph marked No. 23 is the same excavation
480 down below the timbers, showing the hole that we dug
back under the timbers, about 3 feet wide and 4 feet under. That photograph was taken later in order to show more completely the conditions at that point. It shows the catch basis to which I referred.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 52 and is certified herewith as a part of the record.)

The photograph marked No. 24 is the same as No. 23, showing the depth of the excavation below the grillage of timbers, marked with an arrow.

(Said photograph was offered and received in evidence as

Plaintiff's Exhibit 53 and is certified herewith as a part of the record.)

The photograph marked No. 9 is in the northwest corner of the basement of the building, where I put a straight edge across the floor of the wall, showing where the wall had settled. The straight edge is shown towards the bottom of the picture. It was put on a level.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 54 and is certified herewith as a part of the record.)

Photograph No. 18 shows where several years ago they put a stirrup in the I-beam and attached that stirrup to the column, as they were afraid that the beam might break off those lugs. The two stirrup rods are shown running down on either side of the beam. The picture does not show a failure of the cast iron lug. There is no failure there, but they were afraid of it. The stirrup rods support the 20-inch beam in order to take the weight off the cast iron lug. There was a movement of that beam away from the column. That was, I should
481 say, fifteen years ago. I was there, but I did not see this work done.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 55 and is certified herewith as a part of the record.)

Photograph marked No. 6 shows what was once a ventilating system through the basement, and the duct is directly over my head in the photograph. That shows the general conditions in the basement underneath the tower, and the head room in that particular place.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 56 and is certified herewith as a part of the record.)

Photograph No. 7 shows the interior columns, in the northeast part of the hotel, in the basement. They are on jacks and also the beams above have never been fireproofed. The cast iron column is not fireproofed. It shows under each of these two columns jack screws installed at the original construction of the building. They have never been moved and could not be.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 57 and is certified herewith as a part of the record.)

Photograph No. 8 shows what was once upon a time a cooling system for the Auditorium Theatre. They used to fill

this place with ice and blow air across that, trying to get cool air into the theatre. It is now abandoned.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 58 and is certified herewith as a part of the record.)

Photograph No. 13 shows one of the interior columns on the footing, and cast iron flange between the column and the
482 footing; also the head room in that particular part of the basement. The column is fireproofed but not the flange.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 59 and is certified herewith as a part of the record.)

The photograph marked No. 20 was taken under the balcony of the theatre and shows a fractured cast iron strut replaced with a bracket. That strut supports a principal beam in the balcony construction. The iron work is not protected. It shows the wooden construction under the seats in the balcony. Just above these beams (indicating) is all wood construction; that is, above the I-beam running diagonally across the center of the photograph. All above that is wood construction underneath the seats and balcony.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 60 and is certified herewith as a part of the record.)

The photograph marked No. 22 shows where there have been new straps placed on two of the supporting beams under the balcony that have been fractured. There have been new straps put in their place. That appears in the part of the photograph from the I-beam leading down to the horizontal I-beam. It also shows all wood construction above that. All of the construction shown here between the two horizontal I-beams that run in parallel lines away from the point of the observer at the camera is wood.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 61 and is certified herewith as a part of the record.)

483 Photograph number 10 is taken at the northwest corner of the basement, showing the exits from the basement to the main theatre and its narrowness. It shows that the first three steps are of stone and the balance iron. It is an iron stairway.

(Said photograph was offered and received in evidence as

Plaintiff's Exhibit 62 and is certified herewith as a part of the record.)

Photograph No. 11 is one of the interior supporting columns at the northeast corner of the basement, showing that there have been four wings put on that column as extra support. Those wings were not put on while I was employed as engineer at the building, but before I came.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 63 and is certified herewith as a part of the record.)

The photograph marked No. 12 shows a fractured lug under the main auditorium of the theatre. It has been strapped around the column and supported with two wood timbers about 8 by 8. The wood timbers that I speak of are shown just a little to the left of the center of the photograph.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 64 and is certified herewith as a part of the record.)

The photograph marked No. 14 is a photograph taken about 70 feet west on Michigan Avenue, in the basement, and it shows the head room at this point; also, an iron beam that has never been fireproofed to the immediate left of the figure, directly behind me.

(Said photograph was offered and received in evidence 484 as Plaintiff's Exhibit 65 and is certified herewith as a part of the record.)

No. 15 is a photograph of one of the interior supporting columns on the Wabash Avenue side, about 40 feet from the sidewalk, and showing the stone foundation for that; also, the cast iron lug that has no fireproofing.

(Said document was offered and received in evidence as Plaintiff's Exhibit 66 and is certified herewith as a part of the record.)

The photograph marked No. 16 is taken in the Wabash Avenue basement, under the theatre, and shows the stone, or a supporting column on a stone foundation, and a cast iron flange with no fireproofing.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 67 and is certified herewith as a part of the record.)

The photograph now shown me, marked No. 17, was taken in the hotel basement, about eight feet from the landing of the cannonball elevator, showing the beam on the left and right with no fireproofing; also, the head room at this point.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 68 and is certified herewith as a part of the record.)

No. 19 was taken above the auditorium of the theatre, and shows the I-beams supporting the room, and shows also that there is no fireproofing on any of it. Also it shows the truss design under the lateral iron work and truss rods, and the wiring over the arches in the theatre. That is part of the original wiring.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 69 and is certified herewith as a part of the record.)

No. 21 was taken under the balcony of the theatre, on
485 the south wall, showing two fractures of struts; also a very large crack in the wall and a bracket strapped to the column as an extra support to the beam above it, shown a little to the left of the center of the photograph. The crack to which I referred is shown immediately beyond that to the left, and the fractured struts are on the right a little above the center of the photograph, and are shown with reenforcements put on those struts.

(Said photograph was offered and received in evidence as Plaintiff's Exhibit 70 and is certified herewith as a part of the record.)

I obtained a sample of the mortar used in part of the Auditorium Building and sent it to Mr. Parker, of Mr. Fox's office yesterday. The mortar was taken from the third floor hall in the hotel, and the cement was taken from pier No. 1, the corner of Michigan and Congress. The mortar was exterior mortar of the wall, and the cement was the cement from the seams in the foundation.

Cross-Examination.

My technical training as an engineer was nothing but practical. I have been connected with the Chicago Auditorium Association as chief engineer about two years; assistant for ten. I have been there altogether off and on for twenty-four years. I went there in the spring of 1901 as assistant elec-
trician, until the spring of 1907, when I was transferred
486 to the Fine Arts Building as master mechanic. I was in the Fine Arts Building until the spring of 1912. Then I went out of the city, and returned to the Auditorium Hotel in 1915, and have since been there continuously. I became

assistant to the chief engineer in 1916 and remained there as assistant to the chief engineer until about two years ago. Then I became chief engineer and have been ever since.

This cement that I took to Mr. Parker of Mr. Fox's office I got from pier No. 1 in the basement, at the southeast corner of the hotel. That is the pier right square on the corner. They may call another pier No. 1, but I supposed that is No. 1. I took it from between the stone in the basement inside the building. We knocked out a piece there about 12 inches deep into the pier. I should say there was a piece of stone there all broken up about 12 by 12 by 6 inches deep. I suppose it is rubble stone. What I took was stone with the mortar on it. I also took some material from the outside wall and a piece of plaster from one of the hallways. I got this from the outside wall on the west wall of the hotel building, back from Michigan Avenue there, in the alley, about four or five feet from the ground. The wall at that point is brick. There is a piece of brick on this mortar. The third place was on the third floor hall of the hotel on the interior of the building. That was plaster. It was a wall between the bedroom and the hall. The plaster is about ½ of an inch thick. I didn't go in any deeper than that. There is brick behind it because there is the theatre there. It is the original plaster, as far as I know. There was no lath under the plaster. It is plastered right on the brick.

487 Plaintiff's Exhibit 47 shows two layers of timber grillage, commencing on the picture opposite the words in white marked "12 by 12 timbers." That is one layer. There are two here, two side by side. One isn't higher than the other. The apparent two dark squares which on the picture show one higher than the other simply reflects the fact one extends further out than the other. Commencing at the barely visible line of demarcation just back of the paper, that is planking left in there to hold in the cement form. From the top of the paper to here (indicating) is all cement. That is the form left in there when the concrete was poured. These planks are lying on edge. The smooth part of the fill-in opposite my right foot is filler. There was slag in it, stone, and a little cement. This round or curved brick structure at the lower left of the picture is a catch basin. This is inside the walls of the auditorium near the southeast corner of the tower. These timbers against the sides of the excavation were put there to hold the catch basin, and are not part of the structure. The hole was about six feet deep to the top of the

timbers; then we went below the timbers, which was about six feet more. We had to dig through the cement floor with a pick axe.

Plaintiff's Exhibit 48 is the same hole. These props under the catch basin were put there by us at the time we dug the hole. This white object right across the middle of the picture opposite the white printing is just a piece of wood left in there, sticking out of the excavation on the right side.

488 In Plaintiff's Exhibit 49 I did not say there were any timbers under this column, foundation. There isn't any. There is the timbers at the very bottom. That is the foundation beginning there and going up to the column. These timbers do not extend under this foundation. There are no timbers under the column. We dug back under about two feet directly under the column. There was clay in that two feet. We were two feet under the foundation of the column.

In Plaintiff's Exhibit 48 the pipe at the lower left hand corner of that picture is a siphon to siphon out the water.

In Plaintiff's Exhibit 50 that is the same cesspool by the circular brick construction in the right upper part of the picture. The bottom of the trench is the timber grillage. The material on the left hand side of the picture is some more of the form left in, for the concrete.

Plaintiff's Exhibit 51 is the one that shows the railroad iron cut through the concrete to get to that railroad iron. The masonry construction shown on the left hand side is the foundation for one of the tower piers, the southeast corner. The apparent bar extending along the left is just a loose piece of board.

Plaintiff's Exhibit 52 shows two layers of timber. Commencing about two-thirds of the way toward the bottom from the top, there shows one layer. There isn't a space above it. This timber projects out beyond the top ones and makes it look that way. The gray line there is just the space at the first layer of timbers where the offset is. Then comes

489 another layer of timbers. Then in the middle of the picture is a parallelogram which is the top of the second layer of timbers, so that the line extending across the picture from the cesspool on the left is the forward edge of the second layer of timbers. Back of that layer the next material is concrete, that is the form left in there. The upright pieces are also part of the forms.

In Plaintiff's Exhibit 53 the top of that arrow is slightly higher than the second layer of timber grillage. The arrow

is over two feet long. It is about 18 inches to 2 feet from the bottom of that timber down to the excavation. The whole arrow is over three feet. I thought you referred to the timber; they are 24 inches, 12 inches each. This ladder here is the ladder we used during the excavation, and all this dark area surrounding the white spot on the wall near the ladder is moisture. The circular affair at the left is again the cesspool. Exhibit 53, which is also No. 24 on the picture, was taken later than the other pictures, possibly two days later.

Referring to Plaintiff's Exhibit 54, we used a carpenter's spirit level to get that straight edge level.

I do not know who put the strap on, which appears in Plaintiff's Exhibit 55. I could not say when it was put on. I think it has been there at least ten years. The diameter of the stirrup bolt is about an inch and a quarter. There is a lug bolted into the column and the rod is bolted on to that. This is underneath the box floor in the theatre.

It is my portrait in Plaintiff's Exhibit 56. This stuff in the lower right hand corner is material dug out of the hole where the railroad iron was.

In Plaintiff's Exhibit 57 those columns are in the
490 southeast corner of the hotel, under the cafe, not under the sidewalk.

Plaintiff's Exhibit 58 shows a scene about 75 feet from Congress Street, under part of the Auditorium Theatre north of the tower.

I couldn't tell when the fireproofing shown on Plaintiff's Exhibit 59 was put on. I think it has been there at least ten years. The cylindrical looking stuff piled on some pipe near the upper right hand corner is conduit to encase electric wires in. That again shows my picture. I am 5 feet 8 inches tall.

I couldn't say when the strut broke shown in Plaintiff's Exhibit 60. I saw it first 7 or 8 years ago. At that time the surface of it appeared to be rusty. The bracket was put on immediately after it was broken, I suppose. The composition of the ceiling shown through the iron work in the lower left hand part of the picture is plaster. It is constructed with channel iron, iron lath and plaster; I couldn't tell how thick, probably an inch.

In Plaintiff's Exhibit 61 the space between each layer or step is not made of sheet iron. There is some sheet iron back up under the seats. The horizontal lines indicate planks. The material which lies between each horizontal line is sheet iron. The floor layers are made of two inch planks with maple on

top. I won't say for sure because that is covered with a carpet. It has been that way ever since I have been with the building. I coudn't say when the new straps were put
490½ on. I think I first saw them about three and a half years ago. It is the first and the fourth beams that have straps on. The sloping larger pieces in the upper part of the picture, of which the left ones slope upward to the left and then they commence to slope upward to the right are the I-beams supporting the balcony floor. They support the balcony seats. The slanting lines in the lower part of the picture which come from under a beam and slope off downward to the right are the iron filler bars supporting the metal lath and plaster of the ceiling below.

In Plaintiff's Exhibit 62 the portion of the building on which the word "Exit" appears has always been there. It is one of the structural columns.

In Plaintiff's Exhibit 63, I believe the wings on that column were there when I first went to work for the Chicago Auditorium Association. The lobby floor of the hotel is above that column. I think that from the passage line between the Fine Arts Building and the Auditorium is about 20 or 25 feet. The upper floors of the Fine Arts Building do not extend over that far so as to be above that column.

Referring to Plaintiff's Exhibit 64, I don't know when the work was done of putting the strap where the lug was broken. When I first saw it about three years ago, it was done.

Plaintiff's Exhibit 65 shows the basement floor that I am standing on. It is concrete on clay. The bracket I mentioned in my direct examination supports the large pipe
491 in the upper center. There is a beam directly behind. The bracket holding that pipe is bolted on to that beam, directly to the left of my straw hat. That was not done since I became chief engineer.

In Plaintiff's Exhibit 66 the column itself is fireproof. This is under the theatre about 40 or 50 feet from Wabash Avenue.

In Plaintiff's Exhibit 67 this column is further to the east than in the picture you just showed me. It is not the same column. There are two hot water tanks there. To the north of this tank is an expansion tank for low pressure steam, heating the building.

When I referred to beams on my direct examination about Plaintiff's Exhibit 68, I meant the beam on the left and a beam on the right; uprights. In this wall of which the door is a part, to the right is the brick wall running between the hotel

and the theatre on Congress Street. The one to the left goes to the east over what is now called the tunnel, a passage between the Congress Hotel and the Auditorium. That wall is about 18 to 20 inches thick.

Plaintiff's Exhibit 69 shows one of the trusses between the tops of the proscenium arches and the floor immediately above. That is the roof above. The floor immediately above, a portion of which appears at the top of the picture, is made of T-iron, book tile and mortar between. The lower part of the picture shows the construction of the ceiling forming the arch of the theatre. That is channel iron, with iron lath
492 and plaster about an inch thick. There are two of those trusses going across the proscenium arch at this location, approximately 40 or 50 feet apart, I think.

I couldn't say when the fractures shown in Plaintiff's Exhibit 70 took place. I have examined all these for the last three or four years, and they were there then. It appeared to be an old crack.

These pictures were taken in July, 1924. I was asked to take them by Mr. F. A. Vath, Superintendent of the Auditorium Building.

Redirect Examination.

If I said that Plaintiff's Exhibit 67 shows the interior columns in the northeast part of the hotel, in the basement, I should have said in the southeast corner of the hotel, under the cafe, about 30 feet from Congress Street and this first one is about 30 feet from Michigan Avenue.

493 LAWRENCE G. PARKER, a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I live in Chicago and am a structural engineer with Marshall & Fox, Architects. I have been with them 13½ years, and during that period my occupation has been structural designing; designing the framework and foundations for buildings. I took a course in civil engineering in the University of Chicago and was engaged with Purdy & Henderson, Engineers, before going with Marshall & Fox. About November or December, 1915, I was called upon to investigate the strengths

of the structural part of the Auditorium Building for Marshall & Fox and have been called upon from time to time by them for computations and information about the building. I have done such work during the last month or two when I reviewed my previous work and made some additional computations. In connection with my work on the Auditorium Building I prepared certain plats or diagrams. I have here a sheet showing a longitudinal section through the office building, theatre, and hotel building looking south. The red marks indicate the particular parts to which my investigations and computations related. The diagram shows correctly the construction of the building in the parts to which it purports to relate.

(Said document was offered and received in evidence as Plaintiff's Exhibit 71, and is certified herewith as a part of the record.)

494 The blue print now shown me is one of the diagrams prepared by me and correctly shows the construction of the building as disclosed by my investigations in the parts to which it purports to relate. It is a cross-section through the theatre and through the Congress Street portion of the hotel. The red marks are of a similar character as those on the other.

(Said document was offered and received in evidence as Plaintiff's Exhibit 72, and is certified herewith as a part of the record.)

495 That was taken from a point looking west.

The blue print now shown me is one prepared by me and correctly shows the structure of the building in the parts to which it relates to the best of the information I could find. I had access to certain drawings of the Auditorium Building which did not yield a building plan and I had to assemble the information I could find distributed through these drawings and from that I was able to construct this plan shown here. The parts shown in red marks the features especially included in my investigation and they are correctly shown.

(Said document was offered and received in evidence as Plaintiff's Exhibit 73, and is certified herewith as a part of the record.)

496 The blue print now shown me is one of those prepared by me in this investigation and it shows the various constructions for the floors and the roof of parts of the hotel and office building. It shows the roof construction and also typical floors and the first floor construction and some of the steel work. This was especially made up to show the loading

which we figured for this construction as dead load. It correctly shows the features of the building to which it relates.

(Said document was offered and received in evidence as Plaintiff's Exhibit 74, and is certified herewith as a part of the record.)

497 The blue print now shown me is one of those prepared in this investigation and correctly shows the construction of the building and the features to which it relates. It shows the construction of the theatre portion of the building and the roof construction over the auditorium of the theatre; also the storage space floor construction. One section shows the floor construction of the banquet hall which is a room over the theatre portion of the building.

(Said document was offered and received in evidence as Plaintiff's Exhibit 75, and is certified herewith as a part of the record.)

498 In this investigation I especially directed my attention to the strength of the structural members of the building, including beams, girders, columns, trusses and the walls. I discovered that there were various features of the kind mentioned which, according to my computations, were overstressed, or were bearing more of a load than their structural strength justified. Referring to the beams in the office building portion, a typical beam was chosen on the eighth floor, and I found by determining the loads on these beams and comparing the stresses put into the beams by these loads that on the basis of the Chicago building ordinance the beams were slightly overstressed in most of the cases, on the assumption that the beams were made of rolled steel, but at the date this building was constructed, there were very few rolled steel beams used, and I think the chances are that most of the beams used were of wrought iron. The allowance unit stresses in the glanges and compression tension for iron is 12,000 pounds per square inch, and for steel 16,000 per square inch. Now, if I had based my statement upon the assumption that these were iron beams, which they probably are, it would show an overstress of 30 to 50 per cent instead of 5 to 20 per cent. The actual overstress disclosed, upon the assumption that these members were of rolled steel, was 5 to 20 per cent. These were eighth-floor beams, which were typical of a number of floors in the building. I mean that the arrange-

499 ment of the framing on a number of these various floors was the same as on the eighth floor; so that, assuming the same material to be used in these floors, the conclusions

as to the other floors would be the same as on the eighth floor. Referring to Exhibit 73, I found the floor beams in the office portion of the building near the center on the eighth floor on the Wabash side of the building adequate to bear their load, assuming them to be of rolled steel. The beam adjacent to it and bearing a partition parallel to it was overstressed 17 per cent. Another beam in the northwest part of the building, on the eighth floor, marked in red on the plan, was overstressed 17 per cent. On Congress street, in the hotel portion of the building, in the second panel east of the tower, eighth floor, beam was overstressed 7 per cent on the assumption that it was of rolled steel. In the hotel, portion of the building, in the center of the Michigan front, another beam was overstressed 6 per cent. I have figures on some girders, the structural members into which these beams frame. On the Congress street side there was a 42-inch plate girder, indicated on the plat as a red line parallel to the east wall of the tower, on the eighth floor. The girder was overstressed 8 per cent, assuming it was of rolled steel. In the office portion of the building there is a beam or girder, 12 inch I-beam section, at the stairs, near the northwest corner of the building at the eighth floor. This beam is 13 per cent overstressed, on the assumption of being a rolled steel beam. In the banquet hall floor, over the theatre, there are some 24 inch I-beams which are overstressed 26 per cent on the 500 assumption that they are rolled steel members. That covers the extent of the investigation of beams and girders.

On Plaintiff's Exhibit 72 I have already referred to two of the beams that are marked there. There is also a truss over the Auditorium, marked truss B, towards the forward part of the Auditorium in the theatre building. It has a height of 20 feet, span of 120 feet, and is divided into eight panels. It carries the load of the roof over the theatre building. I investigated the only accessible portions of this truss, which were the three lower chord members in the second, third and fourth panels from either end. I found that the lower chord member in the second panel was composed of two I-bars, $2\frac{1}{2}$ by $\frac{3}{4}$ inches, and they were overstressed 43 per cent on the basis of steel members. The next lower chord members from the end, composed of two bars 4 by $4\frac{1}{8}$ inches, 43 per cent overstressed. The next lower chord members towards the center, composed of two I-bars, 5 by 1-3/16 inches, 35 per

cent overstressed. All these upon the assumption that they are steel.

Plaintiff's Exhibit 71 shows some additional trusses investigated, and also some columns. Truss J at the lower portion of the theatre carries a portion of the top gallery and roof and some loads from a rehearsal hall. That truss is 20 feet high, has 120 feet span, and is divided into eight panels. I was able to determine the size of four of the truss members. One of them was the end chord and the center member in the top chord and two lower chord members. The end post was composed of two plates. In that particular member the
501 stresses were within the allowable limits. The center member of the top chord was composed of two 15-inch channels, approximately 40 pounds per foot weight. The overstress in that member was 19 per cent, assuming steel. The center member in the bottom chord was composed of four I-bars, 5 inches by 1 inch each. The overstress was 13, assuming steel. The second member from the end of the truss in the bottom chord, was composed of two bars, 4 inches by $1\frac{1}{8}$ inches; the overstress was 17 per cent.

Plaintiff's Exhibit 74 shows the typical floor and roof construction used in the office and hotel buildings with cinder concrete.

Plaintiff's Exhibit 75 shows the construction of the roof over the auditorium theatre, consisting of book tile supported on T-irons, and also the floor of similar construction for the storage space over the auditorium of the theatre, and also the floor construction for the banquet hall.

Referring to Exhibit No. 71, I investigated the succession of columns shown in the center of the Wabash avenue office building, beginning with the bottom and running to the top, and marked in red on the right hand side of the Exhibit. I investigated the column supporting the gallery and balcony on the center line drawn through the stage and the auditorium of the theatre, and also a column at the southeast corner of the court in the hotel portion of the building.

502 Plaintiff's Exhibit 73 shows the location of those various columns which are indicated on the face of the plan in red. I have a column marked No. 1, which is near the northwest corner of the building, in the office portion of the building, on the various floors, one column right over the other. This column is a cast iron column, beginning near the top of the building. I haven't the size of the column all the way up. There is a 6-inch diameter column in the seventh

story; 7-inch columns in each of the sixth and fifth stories, and 8-inch columns in each of the fourth and third stories. I computed the loading for these columns, the dead loads indicated by these prints, and the live load specified by the city building ordinance; that is for office building 50 pounds per square foot on the floors and 100 pounds per square foot on the stairs, and adding partitions wherever occurring. I found that for the diameters of columns the thicknesses of the metal required to safely carry the load in the seventh story, in the 6-inch outside diameter column, would be 1¾ inches; in the sixth story, which was a 7-inch diameter column, would require metal of 1⅝ inches; in the fifty story, that wall having a 7-inch column, the thickness would have been required to be 2⅜ inches; in the fourth story there is an 8-inch column, which would require metal of 1⅛ inches; in the third story, where
there is an 8-inch diameter column, to safely carry the
503 load would require metal having a thickness of 2-9/16
inches. Metal of the thicknesses required to safely carry the load could hardly be practically constructed into the form of hollow cast iron columns, which these columns are. Because of the excessive thickness of metal, which I figured might be required to safely carry the load, I had the columns drilled at the fourth and fifth stories, and I found the actual thickness of the metal in those stories to be ⅞ of an inch. On the basis of ⅞ of an inch thickness of metal in the fifth story, with a 7-inch diameter column, which we had there, the overstress was 85 per cent higher than permitted by the building code; that is to say, the column itself, if it had complied with the building code, was able to carry only about one-half of the load which it was in fact carrying. I am talking about the present building code. At the fourth floor, in the fourth story, column No. 1 had and outside diameter of 8 inches and the thickness of the metal ⅞ of an inch, as we discovered from boring the column, and the overstress on this column was 74 per cent. I have marked on Exhibit 73 another column which is the one at the rear of the theatre, supporting the balconies and galleries. This column is marked No. 79. From 34 feet to 43 feet above grade, its outside diameter was 11 inches; from 17½ feet to 34 feet above grade, 17 inches; from 6 feet to 17 feet above grade, 13 inches. I assumed that this particular
column is not overloaded. I have a column marked 42-A
504 on Exhibit 73, located in the southeast corner of the court
portion of the hotel building. The fourth story column is 9 inches outside diameter, the thickness of metal 1

inch. The third story column is 12 inches in diameter, and the thickness of metal 1 inch. The column is overstressed in each of those sections 45 per cent.

There was another truss supporting the banquet hall shown in plan on Exhibit 73, and in section on Exhibit 71. It is marked "truss member U" in red pencil on the plan, and also in section it is marked "truss U". This truss is 12 feet high, and has a span of 120 feet, subdivided into eleven panels. There were eight members which were able to measure, one of them being the end post. The overstress in this member was 39 per cent, upon the assumption that the truss was of steel. The loads carried by this truss consisted of the roof loads from the space over the banquet hall and the banquet hall floor. The center member of the bottom chord of the truss was sufficient to take the loads, assuming steel was used as the material. If it were not steel it would be overstressed about 25 per cent. In the next member approaching the end the unit stress was 14,500 pounds, which would be safe for steel but the overstress would be 20 per cent if the material was wrought iron. The next panel approaching the ends of the truss, was all right on the basis of steel, but on the basis of wrought iron the overstress is about 25 per cent. The 505 bottom chord member next nearer the edge of the has an overstress on the basis of steel of 3 per cent, which would mean on the basis of iron a little over 35 per cent overstress. The lower chord member in the end panels is overstressed on the basis of steel 50 per cent, and on the basis of wrought iron it would be nearer 100. That is the truss that carries the roof of the Auditorium proper and the banquet hall above it. I have one other member in that report. It is the first diagonal web member. That is composed of four plates 11 inches by $\frac{1}{2}$ inch. The overstress in that member is 5 per cent, assuming steel, and about between 35 and 40 per cent if composed of wrought iron.

I figured the loads on the Michigan avenue walls and on one space of the court wall. I found the walls are thicker than required by the building ordinance. The ordinance also specifies the permissible unit stresses to be used in supporting the weight carried by the walls, and I found that bearing unit stress has been exceeded. The Michigan avenue wall consists chiefly of piers between the windows. I found that the unit stress in the piers of the wall in pounds per square inch, beginning at the sixth floor was 102 pounds, in the fifty story 130 pounds, fourth story 156 pounds, third story 182 pounds,

second story 186 pounds; on the granite pier in the parlor floor, 505 pounds; and in the first story piers 164 pounds.

There is stone on the face and backed up with brick for
506 the larger part of the piers depends for the most part upon the strength of the brick masonry, since the stonework only forms a shall on the outside face of the pier. In computing these unit stresses, I computed the loads distributed over the entire area of the piers, the stone as well as the brick work, but the strength of the pier depends upon the material and kind of mortar used in the joints. Section 533 of the building ordinance of March, 1916, gives the allowable unit stress for common brick masonry laid in lime mortar.

The brick in this wall appeared to me to be common brick. I have samples of the mortar in the joints taken from the basement pier on Michigan avenue on the southeast corner, with some of the stone in the pier attached. Here are samples of the mortar (producing samples) and part of the stone detached with the mortar.

(Two fragments of stone with mortar attached in a brown envelope bearing the name "Marshall & Fox, Architects, Chicago, offered and received in evidence as Plaintiff's Exhibit 76.)

I made a computation for the purpose of ascertaining the bearing strength of that wall on Michigan avenue. I assumed that the mortar used was either lime mortar or natural cement mortar, which would give allowable bearing strength of not more than 100 to 150 pounds. In the piers which carry the load, near the top of the building, beginning at the sixth floor, the unit stress is about 102 pounds per square inch, and at the second floor 186 pounds per square inch. At the
507 parlor floor were some granite piers with stresses of 505 pounds per square inch. I consider that the safe load should not be over 500 pounds per square inch on these granite piers. In the first story pier I found a stress of 164 pounds per square inch. Any of those stresses above 150 pounds per square inch, with the exception of the granite pier in the parlor floor, would be overloaded; also, the granite piers would be overloaded by the difference between 400 pounds and 505 pounds. On the basis of the highest quality of mortar that I think was used in those walls, the allowable stress would be 150 pounds per square inch. This load is not exceeded until we get down as far as the fourth floor, and there we have 156 pounds per square inch, which would be an overstress of 4 per cent; at the third floor, 182

pounds per square inch, about 20 per cent overstress; at the second floor, 186 pounds per square inch, 24 per cent overload; on the concrete piers of the parlor floor, 26 per cent overload; the first story piers, 164 pounds per square inch, 11 per cent overload.

Assuming that the footings are a continuous line of grillage 9 feet wide, I find the loading of the wall, per running foot of wall, 60,000 pounds. For a footing 9 feet wide the soil pressure would be 6700 pounds per square foot. From my knowledge of the soil, I would assume that the loading of the soil would be approximately 100 per cent more
508 than what should be allowed by ordinance.

I also made computations with regard to the east court wall. I found the thicknesses in the various stories somewhat greater than required by the ordinance, but on account of the window openings, the unit stresses are somewhat higher than the ordinance values, particularly in the first story. The thicknesses of the walls run as follows: at the ninth story, 1 foot 7 inches; eights story, the same; seventh and sixth stories, 1 foot 11 inches; fifth and fourth stories, 2 feet 3½ inches; third story, 2 feet 7½ inches; second story, 2 feet 8 inches; parlor story, 2 feet 8 inches; first story, the same. The unit stresses in the walls run as follows: ninth story, 24 pounds per square inch; eighth story, 46 pounds; seventh story, 69 pounds; sixth story, 80 pounds; fifth story, 102 pounds; fourth story, 106 pounds; third story, 122 pounds; second story, 129 pounds; parlor story, 149 pounds; first story, 171 pounds. I have here samples that Mr. Wade took out of the wall (producing samples). It shows the mortar attached to the brick, which is a part of the brick work of the wall, and the mortar is a part of the mortar bed of the brick work.

(Said samples in a brown envelope furnished by the clerk of the court, were offered and received in evidence as Plaintiff's Exhibit 77.)

The wall of which I am speaking is the east wall of the court, an exterior wall in the court just west of the Michigan avenue portion of the hotel building. The other mate-
509 rial in that wall is common brick. Judging from the appearance of that masonry it might be all lime mortar. There might be some natural cement in it. Assuming it were the best it might be, a natural cement mortar, the allowable unit stress would be 150 pounds per square inch. In that case we would have an overstress only in the first

story wall amounting to 14 per cent. I am speaking on the assumptions the piers were constructed in accordance with the plans of the building furnished to me. I believe I had access to all the plans of this building which were in the possession of the Chicago Auditorium Association. I did not see any complete structural plans of the building. I went through all the plans they had for the purpose of seeing such plans as could be described as structural plans.

On the columns I had drilled I found the fireproofing consisted of circular tile blocks 1½ inches thick plastered to the faces of the cast iron columns. The building ordinance which has been in effect since 1916 with respect to the fireproofing of columns of that character provides that for all interior columns fireproofed with tile or brick, the thickness of tile fireproofing must be 4 inches. The character of the fireproofing on these columns is circular tile blocks. I did not make any close examination of the wood in the building under the gallery or balcony. I observed it while in there but made no close examination. I made an approximate 510 computation as to the quantities of that wood there and found approximately 90,000 or 100,000 board feet in the balconies and galleries.

Cross-Examination.

I got my degree from the University of Illinois in 1902. Since that time my work has been partly in the office and partly outside. The first investigation I ever made in connection with the Auditorium Building was in November or December, 1915, by direction of Mr. Fox of Marshall & Fox. He instructed me to investigate the structural members of the Auditorium Building and to report to him my findings in regard to the strength of the members. I handed my report to Mr. Fox with my analysis which included the majority of these overstresses. I have taken as a sort of basis the building code, which was produced this morning, and which I have here, and I use that as a standard of measurement.

Mr. Cooper. Paragraph 553 starts off, does it not: "Every building or structure or part thereof hereafter constructed, erected, altered, enlarged, repaired or changed within the city shall be so constructed, erected, altered, enlarged, repaired, or changed in accordance with the provisions of this chapter." Is that correct?

511 The Witness: That is my understanding of that particular chapter. I did not intend to imply that the ordinance used as a standard of measurement for these computations was in force and effect when the Chicago Auditorium Building was erected. If 10,000 pounds were the actual tensile strength of a member under pressure it might be that the Building Code might call for the use of a member which would actually support 20,000 or 30,000 pounds; it depends on the quality, on the variation of the material. The building code is framed along fairly conservative lines. My information as to the materials used in this building, was to a large extent necessarily assumed. I have not the actual weight of any girder or column, nor of any pier or wall. I have computed the weights on the basis of the material which in my opinion I believe actually exists in the structure. The variation in the weights of the material would not be very large. Two 12-inch I-beams, owing to varying thicknesses, may differ in weight for the same length, but I did not necessarily have to assume uniformity in thickness in the beams I measured. I took measurements some distance from the ends, probably not more than one to any one beam. I think I misunderstood the question a while ago in regard to the variation in the weights of 12-inch beams. Some run 31½ pounds per foot, others 35 pounds, others 40 pounds, others 45, 50 and 55 pounds per running foot. For any particular beam I would not expect to find a variation of more than 3 or 4 per cent in the weight per foot. I have
512 never seen any beams that varied more than that, and I proceeded on that assumption. In case of the walls I referred to the plans for a part of my information. I had some plans which I believe were the architect's drawings for the original construction. They were not complete plans. There were no drawings which represented a complete construction for any one floor, but there was an immense amount of detail which could be checked up by studying the drawings. I formulated my computations from those plans and by actual measurements at the building. I have not said that I actually put any of the metal work in the building under a testing machine to calculate the strength it will bear. What I have given is based upon computations as compared with the building ordinance. My computations were on the basis that a girder of a certain length and thickness, theoretically will bear a certain weight. I didn't see any girder that showed any indications of excessive deflections, nor any no-

ticeable deflection in any of the beams. There is a so-called elastic limit of steel beams or girders. If you talk about the elasticity, any load will produce a deflection. The deflection begins as soon as the load is applied. I did not see any cracks in any of these girders or beams or in any of the truss construction due to deflection. There might be enough deflection in the beam to crack the plaster without overstressing the beam. On the other hand, the beam might be overstressed without showing signs of cracks in the
513 plaster. There is a showing of deflection in the ordinary beam as soon as you commence to apply an overload, if you had proper instruments for measuring it. I did see definite signs of failure due to overstress, chiefly in some of the cast iron members, lugs on the columns, and some of the structure supporting the balconies in the theatre building. I think I have seen plaintiff's Exhibit 55 before. The kind of evidence of failure I have in mind is such as is shown by that picture and by the broken strut in Plaintiff's Exhibit 60, and by the two or three places repaired as shown by Plaintiff's Exhibit 70. Besides broken lugs or struts I think there was one case where one of the beams framed into the south wall of the theatre building, and the wall was cracked around the bearing of this beam into the wall. That was on the theatre side of the theatre wall, somewhere along the south wall, but I don't know the exact point. I think the crack which appears in Plaintiff's Exhibit 70 is the crack to which I referred. Those are the only things I remember at present.

I do not know positively whether these beams and girders were wrought iron or steel. I have made my computations on the assumption they were rolled steel. The lugs I spoke of as having broken off are part of the case iron columns, and have been repaired at numerous places that I have seen.

Ordinarily the lugs do have something to do with the
514 calculation of the stress of the column, but I didn't figure that in. I did not notice any evidence of failure in any of the floors where I made calculations and testified on direct examination. My calculations as to overstress in my direct examination relating to the bearing walls were also based upon the ordinance and were made for average conditions. If these stone or granite facings which form a part of the walls, were bonded to the walls, it might increase slightly the ability of that wall to carry weight, but not much above what I have assumed for the walls. I did assume it

was bonded. If there was a wall, say on the fourth floor of the Michigan avenue front, and say about four feet thick, I figured on the average that about six inches was brick and mortar. Some of the stones would probably project into the wall more than six inches, and some of them less. I did not actually cut open a wall; I get that thickness by reference to the plans. I measured the windows. I figured for the walls an average of 6 inches of facing from the top to the bottom. In making my estimate as 6700 pounds as the weight per square foot of the bearing walls on the soil, I didn't have the actual weight of the material used. My computation of 6700 pounds is probably not more theoretical than anything. We know the weights very closely of brick work and tile arches and stone work to a large extent. The thickness of the stonework of the piers might more than six inches by an inch or two which would affect the results to a small percentage.

515 I think the requirements of this ordinance about the fireproofing of the columns do not apply to buildings already erected, unless there is a change of the classification of the building, owing to a change in the character of the occupancy of the building. There are in Chicago buildings built prior to 1900 where, if examinations were made, the overloadings would be just as much as I have testified to with respect to this building. I wouldn't say there were a great many. I know there are some.

Redirect Examination.

My examination of the building was not made for the purpose of finding any particular point of weakness or any particular points where there had been fracture. The investigation was made for the purpose of simply finding out what, at different points selected to make a test, were the facts as to whether those structural members were overloaded or not. In some cases I found they were overloaded, and in other cases I found they were not. I was attempting to report on the facts as I found them.

The provisions in the ordinance about fireproofing apply to a building which is being rebuilt or repaired or reconstructed, as well as to a new building. My understanding of the application of that ordinance is that if there is a change

of occupancy, the reconstruction will have to conform
516 to the provisions of this ordinance. If there is no change of occupancy, I am not certain what would be required. I am aware that in the Auditorium Building there has been a settlement of nearly two feet and a half in some places, and to a varying extent in other places. I do not think I could tell in looking at a beam whether its deflection was caused by the direct load upon it, or by the distortion due to the settling.

Recross Examination.

I made these recent examinations and tests in April of this year at the request of Mr. Fox, to give information additional to that in my earlier report.

517 LOUIS E. RITTER, a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I live in Chicago; 76 East Monroe Street. I am a structural engineer and, I suppose, architect. I have an architect's license, and I happen to be a member of the American Institute of Architects. I have been here engaged in that business continuously for 33 years. I graduated from the Case School of Applied Science in Cleveland in 1886. After that I had a year of railroad work with the Erie Road; then two or three years with a corps of engineers on the southern river. I came here in 1892, in January, with the firm of Jenney & Mundy, architects. I became their chief engineer after I had been there a year, I think, and was with them until 1898. Then I formed a partnership with Mr. Mott of the firm of Ritter & Mott, which lasted until six years ago, and I have been alone since that. We have been engaged in the designing of the foundations and structures of all kinds of buildings, high buildings. We have designed buildings twelve stories and higher. We have probably designed, I think, forty-five; acted as consulted engineer on some fifteen of them. There are about twenty-one that we designed in Chicago, and twenty-three outside of Chicago.

518 I am familiar with the Chicago Auditorium Building. I made by first acquaintance with that building in 1915; acted as consulting engineer for Marshall & Fox. That was my first official connection. I had seen considerable of the building in a personal way. I had been acting as consulting engineer for Louis A. Sullivan, of Adler & Sullivan. They were the architects for the building but this was long after Adler's time. In 1915 I was asked to act as consulting engineer for Marshall & Fox in connection with the Auditorium Building, and from that time down to the present I have had occasion to examine the building and to give consideration to its character. It is a building 360 odd feet on Congress and about 160 on Michigan and Wabash, as near as I remember; a U-shaped building, the legs of the "U" being roughly 60 or 65 feet or perhaps 70 feet. The Michigan avenue end of the "U" and part of the Congress side comprise the hotel. The rest of it, including the tower, is an office building. The whole space of the "U" is occupied by the theatre, the stage towards Michigan, galleries towards Wabash street, entrance on Congress and Wabash; a ten-story building. It is a building composed of masonry bearing walls. The interior is composed of the so-called skeleton of cast iron columns and iron or steel floor beams resting on the columns or the walls, the floors being of tile construction. The foundation of the building is what is known as a floating foundation.

519 In 1915, 1916 and 1917 I made a general examination so as to get a line on the general condition, and during recent months I have been over there often. The weight of the building is carried directly on soil, by means of spreading basement piers. I heard Mr. Lichter's testimony in this case in regard to the foundations. I am familiar in a general way with the character of the soil in the downtown district of Chicago.

The Fair Building was built about 1891, an 11-story building, and we were very successful with the design of those foundations. The settlement has not been more than, I think, about four inches. In fact, we allowed for about four inches settlement in those tests. The New York Life, the National Life, the Y. M. C. A., the old Fort Dearborn Building, were all built on floating foundations. The allowance made, under the engineering practice of that time, for settlement of buildings of that character was about three or four inches. We used about 3500 pounds a square foot on the clay in design-

ing the foundations. That comprised the dead load or weight.

Up to 1890 or 1892, riveted steel columns had not been used much. The use had been of cast iron columns, such as you have in the Auditorium. Cast iron has always been an uncertain material to use in structures, as it gives no warning in its failure, and it has very little tensile strength. The failure of a column is not a matter of direct compression. The failure is a matter of bending, and steel adapts itself very much to such stresses and loads. The mills and the shops were beginning to roll steel for building about 1890 or 1892. By the use of steel columns and steel beams,
520 it was possible to make a more rigid frame, because the connection between the steel beams and steel columns was made much more efficiently by means of the riveted connections. That could not be accomplished in the case of cast iron columns. The columns in a 12-story building are continuous from top to bottom, riveted together by means of flange connection plates. The old cast iron construction was a case of columns resting one on top of another, and it did not have that rigidity which the steel columns do. I should say that the structural design methods employed in the Auditorium Building are obsolete. That method of construction has been superseded by an entire steel skeleton, in which the enclosing walls and the floors are supported on the skeleton. Instead of having the exterior walls carry the load, the steel structure itself carries the steel walls. That substitution of the modern steel structure in buildings of this general type and character has gone on very extensively; it is universal. While the bearing wall type of structure is still used to some extent, that has been practically superseded by the modern steel structure for all buildings of any great size or character.

In a modern fireproof building, various tests are made to determine the bearing or tensile strength of the members. That is done in testing machines by bureaus of inspection. In modern requirements of an office building, or any other steel building, the specifications call for a test of the steel.
That means all steel entering into the building is tested
521 by samples by Robert Hunt, or some of those other testing bureaus, to show that it will come up to the required strength. This practice, has become universal. At one time it was the exception for tests, but now it is the practice to have tests for everything. Prior to 1890 there were tests on the Fair, but it was not as common practice as it

is now. It confined itself to the question of tensile strength. Now they take the bending and more elaborate chemical analyses.

The old type of building was the wall bearing building; the exterior walls formed an enclosure and they also formed a support for the floors, and this support was supplemented, when the distance between the walls became too great to be spanned by interior columns. The type of modern skeleton construction was an entire change from that. The walls were no longer used as structural members, but simply to enclose. That is the main difference. To that was added the improvement in foundations. They found it was a matter of economy in the end to provide foundations that were independent of settlement, and the caissons developed; the first caissons going down to hardpan. Many of the caissons now go to hardpan, a stratum about sixty feet below grade. Others go to rock. The caissons have been more practical than the pile foundations, because with piles it was necessary to go down so far as to keep them permanently immersed in water, on account of dry rot.

522 I should not say the Chicago Auditorium Building is a fireproof structure. I had occasion to examine some of the broken struts in the second balcony and the gallery, and when I was there I saw that those struts were built of wood. I saw probably a hundred thousand feet of lumber in there, and it impressed me at the time as being the other side of fireproof. Now, that is all there is to it. A hundred thousand feet of lumber makes a good bonfire. I noticed a number of columns in the basement that had no fireproofing, in going through, and there were some exposed beams in the basement. I saw a number of cases of unprotected beams and columns in the basement. Not only is the wood unprotected, but the iron or steel itself is bare.

I heard the testimony of Mr. Parker here. I have looked over his computations and calculations and conferred with him at the time he was making them. I should not call the Chicago Auditorium Building safe as it now stands. There has been some very definite investigation, and the investigation shows some very definite overstresses. The ones that I think of in particular are column in the northwest corner, near Wabash avenue. It showed overstress of 80 to 90 per cent; the column that was drilled. I think an overstress in a cast iron column is a very, very serious

thing. Then another point is the overstress in the
523 trusses, where the truss members were measured in the field, and the loads determined from measurements of the material that go to make up those loads, and the resulting calculations show certain stresses per square inch, which good engineering practice, to say nothing of the building ordinance, show to be dangerous. I am familiar with the levels and the changes in level that have taken place in the building. That is simply a question of the foundations. They were not adequate to take the load of the building, and they settled, that is all. Those foundations, in my judgment, are not adequate to take care of that building now and in the future. I understand the settlement in the last years has been comparatively slight, hardly any, and I should say if the conditions were maintained as they are now of the surrounding territory the soil conditions, I cannot conceive of any reason for any further settlement, but if, on the other hand, there will be excavations, there may be excavations of some magnitude in the vicinity, I am very sure that they will have an effect on the foundations of this building, judging from similar cases in the past. If a new building for the Congress Hotel is erected across Congress street from the Auditorium Building, and the method of foundations adopted is the caisson method, I think it would increase the settlement and as to what the exact effect of that settlement would be on the rest of the structure, I would not dare to say.

I know of no way to put caisson foundations under the
524 Chicago Auditorium Building. We have discussed that, and I have had some experience in that matter. I just got through taking out the foundations of the Fair building, which we designed in 1892, and putting in a subbasement and carrying the foundations on caissons. I have heard of various suggestions for taking care of the engineering features and putting caisson foundations under the Auditorium Building, and other buildings of that character, but no method or suggestion has any value unless it is worked out in detail, and I have seen nothing of that kind. I would want to see the entire scheme laid out in detail, with proper figures. I have thought of it enough to say I have not found anything that in my judgment would be workable. The first difficulty is supporting the present building while the present foundations are taken out, and the nature of the present foundation is such that they take up a great deal of basement space, and the operation of putting in sufficient shoring to hold up

the old building and at the same time not interfere with the present piers, is a stumbling block, in my mind. It may be somebody has ingenuity enough to do it, but I don't know of any way. If I went in now to put caisson foundations under these interior columns I would first have to devise some method of sustaining the present structure while taking out the existing columns and carrying the caissons down to bed rock. I know of no practical method by which that could be done at the present time. If an operation of that sort were attempted and it had not been worked out from
525 an engineering standpoint there is always a danger of collapse. Parts of the building might fall down; an interior column. As to what the extent of a larger character would be, I couldn't say.

I know the extent of the overloading in that building figured by Mr. Parker and from my own knowledge; and I know what the character of the construction is, with these cast iron columns and cast iron lugs. If in the process of an operation of putting in caisson foundations, a breakdown started at some particular place, it would be more dangerous than in the case of a steel skeleton, because in a steel skeleton there is that tying together of the floor systems and the columns by means of the beams to the steel columns, whereas in this case of a cast iron construction, there is not that definite tie. The tie is not nearly as efficient as in the case of steel, and for that reason the danger of further collapse following a local collapse is greater. Cast iron is a very brittle metal. I have seen some of the cases of failure right in this very building, where the cast iron lugs are broken, and there has been a fracture of the cast iron beams. I saw that photograph, and the struts in the balcony, and saw some others there in the balcony, of which it has not been practicable to get photographs. They consisted of the replacement or the repair of struts that were about three or four or five feet high, and cast iron brackets In other cases; that is, the struts and the brackets supporting
526 these inclined beams to the horizontal beam, and that is where the failures occurred in this connection of the brackets and the struts. This was under the balcony. I think I counted about 25 of them. In case of the construction of a subway in Michigan avenue or Congress street, or the excavation for new buildings in the vicinity of the Auditorium Building, say, across the street on Congress street and across on Wabash avenue, I think there would

be danger of serious fracture arising suddenly in parts of the Auditorium Building. If my advice were asked as an engineer, by the owners of the Chicago Auditorium Building, whether they were the owners of the fee or the owners of the leaseholds there, with reference to the structural future of that building, I should say to them first, "Your building is in a dangerous position from the point of view of good engineering practice, common sense, because some of the important members are overstressed." To be conservative, I could not say tear it down. I could not say that. I would advise, though, to at once make a more exhaustive, comprehensive, definite examination of the whole structure, and keep it under observation. That is the best thing I could offer. The easiest thing would be to tear it down. That would be the easiest, but I would not care to take the responsibility of saying anything like that. I should say that the building required serious reconstruction or strengthening, and for this reason Mr. Parker's investigation picked out a number of points for investigation, and he hap-
527 pened to land on the bad eggs every time, so there may be others.

It is quite possible that an investigation would show the necessity of a renewal of remodeling of the interior construction of that building, especially in the case of the theatre. I think that is the most hazardous place, the theatre part; the fire hazard and the construction of those balconies. In the office building and in the hotel building various members are overstressed. There is a great deal of this cast iron construction, particularly of the columns. If you should reconstruct and strengthen the theatre part, the character of the remaining part of the building, the hotel end as it now stands, and the office end is shown in part to be unsafe, as I have stated. It may be all unsafe, or perhaps these were the only parts that they hit upon that happened to be overstressed. I don't know. That is the reason for making a definite, detailed investigation. It would have to be complete. It would mean that every column would have to be examined in detail. Every column would have to be bored in three different places, at least, so as to get an idea of its real thickness. Every lug would have to be examined. Every connection would have to be laid bare. Any other sort of an examination would not mean anything, it would be simply hitting the spots. Then as far as the trusses are concerned, that is very important; they would have to be entirely

stripped and every riveted joint gone over, in my judg-
528 ment. The condition of the building as it is now shown is sufficient, in my opinion, to say, without such an investigation as I have just been describing, that the building from an engineering sense is unsafe, in my judgment. In part as disclosed, and perhaps all, it is unsafe. Part of it is unsafe. If the parts that have not been examined were found to be like those I have examined, the whole thing would be unsafe; and if those parts were found to be safe and not overstressed, it would still leave these other members, about which we already know, overstressed, and they would have to be taken care of and strengthened in some way. That operation would be, not difficult, but extensive and expensive. I want to say one thing before going ahead. We could never tell what that would lead to; simply the question of taking care of the columns and connections. It is a question of the foundations. They would have to be taken care of. This question about subsequent building operations and all that is not a question I could answer offhand, there are so many things involved in it. I think further building operations would cause more settlement. In my opinion the owners of that building, no matter whether they are the owners of the fee or the owners of the leaseholds, could not afford to wait, in my judgment, as an engineer, until such operations are likely to occur in that neighborhood, in the way of caisson foundations, and so on, take place. I think they
529 should not wait, but that is up to them. My judgment is, if there is a condition of unsafety disclosed, it is everybody's duty to take hold of it at once, but I am only speaking as an engineer now. In case of the construction of new buildings in the neighborhood of the Auditorium I think there would be increased settlement due to the withdrawal of the water by deeper excavations, and possibly an actual movement of the earth between the Auditorium and the excavation even at some distance. It is gradual, but the withdrawal of the water, I should say, was the main factor, and there is nothing to guard against that that I know of.

It was customary in those days to use spread foundations when the Auditorium was built. I think the exceeded the load, though. I think the foundations are too small; well, there is no thinking about it, because the settlement has been two and a half feet. The present spread foundations of the Auditorium Building are not sufficiently large to carry the load, because the building has settled. If conditions

continue as they are now there, I expressed the opinion that there would not be any more settlement under the building, so far as we can judge from the reports of the levels furnished from time to time. The only thing that could start that down would be a change of soil conditions, which would be the result of some excavation in the vicinity.

530 The purpose of the thorough investigation of which I have spoken would be in case it was found practical and desirable to reconstruct the building and it was desirable to utilize the existing structure as far as possible. It would not be necessary to have any such thorough investigation as that in order to determine whether there should be substantial reconstruction of the interior of the building. What I had in mind was this: If the reconstruction was to be undertaken and it was desirable to use the existing materials, it was necessary to investigate every member in detail to show that it would comply with its requirements, and especially the cast iron columns. The columns of the building are a very important part of the structure. They rank much higher in importance than the beams and the girders. Failure of a column involves a much greater failure than the failure of a beam. The failure of a beam is local. The failure of a column may bring down portions of an entire floor, portions of an entire floor and, in fact, a number of floors above each other, or an entire section of the building. For that reason the question of the sufficiency of the columns is very important. In this particular case where we have cast iron columns, our knowledge and experience with that type of columns has taught us to regard them with suspicion. A column may appear of a certain diameter but it will be necessary to find out what the thickness of the metal is. I spoke about boring the columns at three places. That is to make sure that the thickness of the metal at all points of the column was thoroughly determined. Besides that,

531 it is a question of the nature of the castings and all that sort of thing. That is what I meant by a comprehensive examination of all the columns with the thought of a possible scheme of reconstruction or conservation.

Materials used in buildings, especially in large and important buildings, are now subjected to many and rigid tests before they are used. The material that enters into the construction of the skeleton, which is steel, is tested. Samples are taken out and the physical and chemical prop-

erties are determined to see that they agree with the standard specifications which prescribe what they should be. As regards the suggestion that has been made of a distinction between theoretical and practical methods or experience in building, you might say a building proposition is an entirely theoretical proposition; that is to say, a modern building is built in the drafting room, on paper entirely. Every process that goes into the final erection and completion of that building is absolutely determined in the drafting room and sent out in the way of drawings and specifications. A modern building is of the same character as a cantilever bridge, where every member is theoretically determined and its practical putting into place follows definite procedure. That also applies to foundations, of course.

In modern building operations it has been demonstrated that the scientific or theoretical is most decidedly advantageous over the practical. The modern steel skeleton
532 building is an adaptation of bridge engineering. The bridge is a structure in which every member is under a definite known stress determined by calculations. The modern steel building almost approaches that same proposition. The only stresses that are not quite definite, in spite of our knowledge of the subject, are the stresses that are occasioned by wind. They are within very close limits and we make some provisions for them. One of the prerequisites of being able to get the unit stresses of buildings of course all depends on a rigid foundation, and any settlement is apt to disturb the nature of the stresses and the amount of stress in various parts. For that reason the question of caisson foundations and pile foundations becomes very important. In view of the past history of the Auditorium Building and the known character of the foundations under it, the question of the safety or unsafety of that building or its future is absolutely indefinite, that is to say, indefinite as far as detail is concerned. We do know that parts of it have been disclosed as unsafe. Assuming we would be able to take care in some way of the interior construction above the foundation, that would still leave the foundation problem unsolved. The foundations as they are now are always liable to settlement due to future excavations in the vicinity. Any settlement of that kind is bound to affect any scheme of reconstruction that you may put in. Even if we got safety above the foundations, we would still have that fundamental

unsafety in the foundations themselves. When I spoke
533 about it being the easiest thing to tear the building down, I simply mean the whole problem is involved and indefinite. The simplest way is to tear it down.

In regard to what I said about not feeling justified in saying the building should be torn down, I will simply state that I could not take that moral responsibility. I couldn't afford to have an owner depend on my word and enter into a proposition of that kind. It may be that others would find a way. I couldn't take that moral responsibility. That is exactly what I mean by that. I couldn't take the responsibility of advising the owner to tear it down immediately. I said yesterday I was unwilling to assume the responsibility of advising the owners to tear down the building for the reason that while I could think of no way by which it could be made safe for use, someone else might be able to figure out a way. If I were asked my opinion about how long the owners of the building should wait, if they were acting on my advice, before they tore it down, I should say: "This building is unsafe. I don't know whether any future developments are going to increase this hazard; probably will on account of the settlement of foundations. I have told you the thing is unsafe. You can do as you please. I am through." That is exactly what I would tell him, in view of my responsibility as an engineer. I would not proceed to form an opinion as to what he should do until he made up his mind. I have been there and I have learned my lesson about taking responsibility for the owner. I re-
534 cently had an experience in advising owners as to the unsafety of buildings. I told him it was unsafe. He said it had stood for a great many years. I made a report. It fell seventeen days after the date of my report and killed two people, and there was a half a million dollars loss in property. I do not care to say where it was because they haven't got settled up yet with the insurance companies. The question of safety or not safety is a very difficult matter to decide where a building, theoretically or on engineering principles, is unsafe, but as a matter of fact has stood as a structure. I can give another case of that kind which happened twenty-five years ago, the old glucose refining factory at the corner of the river and Taylor Street. It was a brick building, 11 stories high, quite a unique building, factory, brick walls, with interior wooden and iron posts. The west wall seemed unsafe. Some of the officials thought it would bear investigation. I was asked to look it over and make a report. I re-

ported to Conrad Matson, the president at that time. I told him it was unsafe in my opinion and should be taken care of. He said, "Well, it stood for twenty years. You engineers aren't going to alarm me." That was the end of it. I put my report and recommendation in writing. By a strange coincidence that wall gell just exactly a year after the date of the report. It fell on a Sunday night, fortunately. If it had fallen fifteen hours later it would have killed a couple of hundred girls working in the floors below.

On the other hand, the owners of The Fair have a cornice that showed failure in places. Their architects and some of their engineers decided it was unsafe. About a year ago
535 the question arose of taking it down. They were going to take it down anyway on account of further stories they were going to add in the near future, and the cost of taking it down at this time was a matter of some $35,000 or $40,000. They were unwilling to spend that money. They asked me to investigate it, asked me if I could say I thought the thing would stand for a year. I have taken that responsibility. The year will be up the 28th of June. There you are. Others thought it was dangerous, might fall any time. It is a pretty hard proposition. There were some caissons put under The Fair building under the entire structure. The building had been on floating foundations originally, which were the usual distance below the sidewalk, about eleven feet. It was decided to put a sub-basement under that building, going down 50 feet below grade approximately, and naturally those foundations were in the way. So they were taken out and the caissons substituted.

In the case of The Fair, all the load was supported on individual columns. It is a skeleton construction. The columns were of steel. The basement is perfectly clear, the foundations are of the flat type, two layers of beams, in some cases beams and rails, and they are all below the basement floor. That gave an opportunity of supporting all the columns without trouble. There was sufficient room for the shoring. The nature of the design of the columns, steel, rivets permitted the design of the proper clamps and brackets to hold these columns on the shoring on either side. That is the feature that is not present in the case of the Auditorium.

On account of these other features in the Auditorium I
536 was compelled to say I knew of no practical way at this time for carrying out the operation of taking out those foundations and putting in caissons. I do not think the op-

eration such as we performed at The Fair could be performed on the Auditorium.

The jack screws under some of these walls or columns could not in my judgment be used in any way to offset or affect the settlement in the building unless they have been taken care of. If they were all rusted in, they form part of the column, you might say. No use trying to use them.

Cross-Examination.

All my recollection of jack screws in the Auditorium is I remember seeing some under columns supporting the sidewalk. As near as I can remember the one I saw was the case of a single jack screw under a column, and I have a very hazy recollection of that. Assuming there was one I saw under a sidewalk column, it would not be a particularly difficult engineering problem to shore up the particular weight that column is supporting long enough to take out that jack screw. That could be done with any jack screws under any column.

Bed rock varies, as near as I can remember now, in the loop, say from 95 to 110 feet below grade. It is commonly understood that there is a layer of bed rock under almost the entire, if not the entire, loop or business district of the City of Chicago. The first time I know of that caissons were put under floating foundations in Chicago was The Fair, about two or three years ago. That is the first one I have per-
537 sonal knowledge of. There have been others, but at this particular minute I am not prepared to state them. I could not say whether they were putting caissons under the foundations of buildings as early at 1900, but I remember there were some cases I have heard of, the Old Colony Building, and some others.

In the balcony construction, where I found there was approximately 100,000 square feet of wood, it was used to form the steps which support the seats of the balcony. At the present time the usual construction is concrete. If wood were replaced by concrete, the wood is a certain dead load, and the beams that carry that wood are figured for that load. It is quite possible that the beams would have to be reinforced or something done to carry that additional load of concrete. The concrete would increase the dead load of the balcony. Changing the wooden construction of the balcony to concrete would increase the dead load of that particular construction.

These cast iron columns which I referred to have flanges at the top. It is the general practice that the flanges of one column at the top are bolted or fastened to the flanges at the bottom of the column immediately above it. The purpose of the bolting together of the columns that are one above the other is to give rigidity. It is decidedly. It is customary in making excavations for foundations under buildings in Chicago at this time for the builders of the new building to pay particular attention to the effect the excavations have or may have on adjacent buildings. They are not obliged to; just a matter of decency, that is all.

538 The opinion I have expressed in regard to the lack of safety of the Auditorium Building is in part upon the testimony of Mr. Parker. I did not personally make any examination of the structural portions of the building for the purpose of preparing calculations as to overstresses. Mr. Parker took those measurements. If Mr. Parker's figures should be incorrect, I would be to blame for the incorrectness, because I assisted him, at least reviewed the figures with him at the time. I did not make any examination of the records of bridge and steel building manufacturers or other steel manufacturers as of the year 1886 or 1887, to find out what weight beams they were making at that time for the different sizes. I know that at the present time 12-inch beams are made as many as seven or eight different sizes, and their weights vary from as low as 28 pounds to 55 or 60 pounds per lineal foot. They made very few sections in 1885. I have a record somewhere. Any way, that didn't cut much figure, the question of the beams, in my mind, as far as the safety is concerned. I base my opinion as to safety mostly on overstress in the columns and trusses. The columns weren't heavy enough to carry the construction. The building was put up about the year 1887 to 1889. The load was applied during the process of construction. I came here in January, 1892. At that time the building had been completed, I think. There have been no additional stories added since that time, to my knowledge. It stands to reason that all the dead load had

539 been applied by 1892. The dead load is the weight of the structure. The live load is the weight of the occupancy, the things that go into the building. I take it the dead load was complete when the structure was completed, with one possible exception. Very often the question of division of offices is made later and quite a dead load added in the way of particulars. I don't know whether that obtains in this case

or not. If the condition of unsafety results in some degree from overstress, this dangerous condition commenced when the building was completed, when it had received its total load. The building from the standpoint of overstresses was not as great in 1890 as it was in 1915. The difference is in the settlement. It is fairly reasonable to say the settlement has put additional stresses on some of those columns in the nature of cross bending. In the table of settlements which was introduced in evidence, I saw that virtually sixty per cent of the settlement took place during the first five or six or eight years, and that during the past ten years the settlement has been almost negligible. It may reasonably be stated that when the major portion of the settlement had occurred the greatest amount of overstress occurred. I can't say that the percentage of unsafety from overstresses alone, and without regard to settlement, would be the same from the time the load was applied, assuming that the load was constant, down to 1915, or to the present. We are speaking of the columns now. I have known of cases where steam pipes or water pipes have been near columns, cast iron columns of that kind, and there has been considerable rust. Now, the rust would certainly decrease the area of the columns and in
540 that way the percentage of overstress would be increased as the years go on. Aside from that, I do not at this minute know of any other element aside from that of settlement that would increase the percentage as the years go on. We are talking about the dead load only. If the columns were kept free of rust by painting or other process, the overstressed condition would remain constant, without taking into consideration the settlement, I could not say that the minute the settlement starts and goes along that danger accompanies it. It may come after. It may be a result of settlement. The effect of settlement is not direct. It is general. It causes a distortion of the general scheme. A distortion caused by reason of settlement comes fairly upon the heels of the settlement. If the outside wall would settle 6 inches in one year, you could see within the next year that the column had gone down, pulling the beam with it, but at the same time there are secondary developments in adjacent columns, due to that same settlement of that one foundation. As a general proposition the distortion follows closely upon the major settlement, speaking in a general way only. The Auditorium covers a very large area. Assuming it to be true that each pier in Mr. Greeley's table of levels has settled approximately

the same amount every year, there is less distortion in the exterior walls than there would have been if the settlement had been uneven in those piers.

I only worked in a general way with Mr. Parker in the preparation of the blue prints offered in evidence as Plaintiff's Exhibits 71 to 75. He referred some of the things
541 to me. He did all the work. In Plaintiff's Exhibit 75, in the upper right hand corner two "I's" followed by 25 mean live load, which is established by occupancy and may change from time to time. I don't know where Mr. Parker got the figures. They are purely estimates, based on experience. That is a long story that leads up to that. I think the building code of Chicago was used for the purpose of establishing the live load figures, but, as I said before, Mr. Parker did all of this work. I acted in an advisory position, so I am not competent to answer definitely questions on that point. I did not make any of the figures. He advised with me.

In steel construction at the present time, I said it was customary to make some provision for wind bracing. That was not done in 1887, as far as my knowledge goes. I don't know of any case. On a large building like the Chicago Auditorium, which is a comparatively low building according to modern standards and is built of bearing walls, it would not be necessary to make any provisions for wind bracing in my judgment. I did say something about a more thorough investigation. I should say that a more thorough investigation should now be made before I would give the opinion that from an engineering standpoint the whole building should be torn down on account of overstresses testified to by Mr. Parker. That is to say—let me make myself absolutely clear. We have a general knowledge of certain conditions and we have definite knowledge of certain overstresses, quite a few, but we should have some more.

We called attention to the unsafety of the building in
542 1917. I did report it unsafe at that time. I don't know whether I would have reported the building unsafe on the same hypotheses in 1890. I would have to think about that. It is true that if I had applied in the year 1890 the figures which Mr. Parker testified to, relating to overstress, I would have declared the building unsafe then. In giving my opinion as to safety or unsafety, I am giving it purely from the engineering standpoint. I do know of other buildings in Chicago that are scientifically or theoretically unsafe, that are still standing. I don't know how many, but I know there are quite

a few. Some of those buildings are still in daily use. Yes, each separate job of caissons under a floating foundation, such as The Fair store, presents its own particular problems. I have not been on record as saying that a job could not be done. I simply say I don't know of any plan. Practice and theory should go hand in hand in this kind of work, but it is true that when you get down under there you sometimes find conditions you cannot anticipate from a theoretical standpoint. I have had occasion to go up and down caissons and superintend the construction of them. I did not go into the construction of The Fair. The first caissons I went into, I think, were the caissons of the John R. Walsh Bank, which is now the Central Trust, about twenty years ago. I have been in a number of them since then. Such things as specifications relating to stress, particularly referring to the figures contained in the building code which Mr. Parker mentioned
543 and used do change from time to time, and those changes are dictated by experience. By way of illustration in the days of the wrought iron stress, the fibre stress used in computation of the beams was 12,000 pounds. After the introduction of steel they found that was increased to 16,000 pounds. Since then the manufacture and the production of steel has proved to be so uniform in quality that they are beginning to use 18,000 pounds of the same steel. Now, I think that answers the question. Our city ordinance, I think, is still 16,000. Omaha and some of the others have gone up to 18,000. They are talking about making it 18,000 here, but I don't know whether they have put it through now. Quite possibly the city ordinance is 2,000 pounds less than that prescribed by such organizations as institutions of architecture and structural engineers.

I think all the fractures of struts and the like that I saw under the balcony were repaired. I got in these some time in April and saw most of those repaired and replaced, the fractured pieces. I think I counted about twenty-six of them. That included struts and the fractures at the lower end of the inclined beam, and it is rather a difficult place to get into with a spotlight. To the best of my knowledge, they were all repaired. They were distributed both at the north and south end of the balcony, and some near the top and some near the bottom.

If it should turn out that all the metal work used in the building for structural purposes, aside from the columns, was

rolled steel, well it has been shown that the trusses show
544 an overstress based on steel, and if they are wrought iron that overstress is simply increased. But, in my judgment, the difference between the original overstress and the theoretical increased overstress does not cut any figure. The condition is unsafe anyway, if that answers the question. Steel is better now than wrought iron for girders, beams and trusses. It was not some years ago. Wrought iron has certain advantages of ductility and more uniformity of behavior. In my opinion a building does have to be strictly and exactly in accordance with the building ordinance of the city of Chicago to be safe. If it deviates in any particular the building is unsafe from the point of view of the Chicago building ordinance. That is the purpose of the building ordinane. Using 18,000 pounds pressure where the building calls for a 16,000 pounds pressure would be unsafe under the building ordinance. My opinions are based on the building ordinance and good engineering; not restricted to building ordinances. The building ordinance is very closely related to good engineering and these deviations, after all, are not very great, such as the difference between 16,000 and 18,000 pounds on the question of the fibre strength in the steel. To answer the question whether sometimes a building may deviate as much as 8 or 10 per cent from the building ordinance specifications and still be safe, you will have to make up your mind what you call safe and unsafe. My opinion is not based entirely on the building ordinance. I will tell you why I
545 said that in my judgment this building is unsafe. The question of overstresses on the beams and girders, in my judgment, doesn't cut much figure, because they are local. My idea of the unsafety of that building is based, taking everything all together, on these disclosed overstresses in the trusses, based on conservative calculations, as I remember them, of Mr. Parker, on overstresses in the columns that were definitely measured by getting their thickness, and the question of the general settlement of the building all combined led me to that opinion. Now, there you are. On the assumption that the building was constructed in accordance with the building code, then in force and effect, if we should apply the specifications of the then building code, it would be safe then, and it is not safe now. I can hardly conceive of a building code that would provide fibre stresses that would make that overloading come within the limit. If it is assumed that the present city code has building requirements which are the

best engineering practice, but which were not in use or perhaps known in 1887, it is not the fact that this change in building requirements is very largely the basis upon which I have formed my opinion that the building is now unsafe. I was tryng to show that my opinion is based on present facts, that is all, and present engineering practice, and, as I said, the building ordinance is very intimately tied to good engineering practice, and the possible variation of 16,000 to 18,-
000 in the beams, in my judgment, does not cut much fig-
546 ure, as far as the general proposition is concerned. By the facts I mean the facts which have been produced in this record, and particularly those produced by Mr. Parker. When I testified that the structural design methods employed in the Auditorium Building had become obsolete for a building of that size, I spoke from the engineerng standpoint entirely. The question was confined to the engineering design.

I began my work as consulting engineer for the Chicago Auditorium Association before the year 1917. I think some preliminary investigation was done in 1915. I think Mr. Parker testified as to when he started those calculations.

As to danger from excavations in the neighborhood, I should not say you could wait before doing anything to the Auditorium Building until the excavations were begun or were about to be begun. Whatever you would have to do would probably take a great deal more time than the period from the beginning of the excavation to that point in the excavations where they would begin to affect the Auditorium foundation. As to whether you could wait before you did anything to the Auditorium until they had begun excavating next door, I should say no, because the amount of work you would have to do in the Auditorium, the period of time occupied by that, would be very much greater than the period of time from the beginning of the excavations to the point of the excavations where it would affect the building. You would get caught, that is the idea. I don't know whether excavating would give us time to take care of the Auditorium. It is customary, under ordinary circumstances, yes, but this is not ordinary circumstances.

547 I don't remember whether I gave an opinion to the Auditorium Association in 1915 or 1916 as to the safety of the building. I had some talk with Mr. Fox. I think I made a report in 1917. We have had some conferences, Mr. Fox and I, on the matter, and I don't remember the details right now. I am a consulting engineer in independent prac-

tice. Marshall & Fox are one of my clients. I have been doing consulting work with them for twenty years at least, and questions have come up and they have called me and asked me about it, and my particular connection with the work was either more or less. Sometimes it was very slight. Sometimes it was very extensive, such as the case where we made the entire design of the structure at the Blackstone. I do have a recollection that from 1915 and thereabouts the question of the Auditorium has come up every little while and Mr. Fox would ask me some questions, and Mr. Parker would ask me some questions, and then when this more increased activity came up, around 1916 and 1917, which resulted in these calculations and blue prints, the questions and the consultations with Mr. Parker and Mr. Fox were more frequent. I don't remember ever making a report to Mr. Fox or the Auditorium Association. My reports were oral. I did not say that I considered if an overstress amounted to 5 per cent that the building was just as unsafe as if the overstress amounted to 50 per cent. I think I said it is unsafe as far as that ordinance is concerned. What I am trying to get at is that the question of safety and unsafety is not a sharp line. The
548 question of the safety of a structure and its unsafe condition, the boundary between those two states, is not a line. It is a zone, a zone of varying length, no man's land. A great many things enter into it. A structure may be stressed up to 100 per cent overstress and still be safe, provided we have all the definite knowledge of its condition and condition of loading and attendant condition of occupancy, and all that sort of thing. This idea of safety factors, as they are called, are what take care of that. When I mentioned one or two buildings which I reported as unsafe and which fell in a very short period, I did not mean to imply that the Auditorium Building was in any such condition as those buildings. I would not tell about it if I did.

Redirect Examination.

If I acquiesced in the implication in Mr. Cooper's question that the recent settlement, the increased rate of settlement during the recent years, was negligbile, I meant negligible in the sense of settlement per se, as far as the levels are concerned. I do not regard the recent settlement in the last 10 or 15 years in the Auditorium, and the settlement which the evidence shows has gone on in the last five or six years in

the rear wall, as negligible from an engineering standpoint; not negligible from the point of view of increased stress we don't know anything about; that constant stress on the frame. I should say there is always the possibility or probability of those being in action all the time, increasing action. Those
549 are the uncertainties I don't know about. The fact that the settlement, although at a reduced rate, has continued down to the last four or five years, means the entire frame is not in definite equilibrium. That is important in determining the question of the safety of the safety of the structure. When I answered the question using the word "negligible" I meant comparatively speaking with what took place in the early years. I was not thinking about the engineering effect. Any settlement is, in my judgment, important as far as its effect on the stability of the structure is concerned.

If there were any fractures in any part of the structure of the building in the neighborhood of the columns, that fracturing might very possibly increase the load upon such columns. It is very impossible it would shift the bearing of the load. If the balcony dead load were increased by fireproofing material or otherwise, that might lead to a substantial overload on some of the girders or beams below it, and that overload, if it occurred, would extend to the foundation. That is the ultimate resting place, the soil.

Recross Examination.

I believe those particular piers under the balcony are the piers that are higher than the outside walls. I have no definite information on that.

I do not know whether it is a fact from the standpoint of settlement that the Auditorium Building is safer now than it ever was. The reason I can't say that is this: The
550 large settlement that you speak of may have ceased, a smaller settlement going on. The thing that I don't know is the movement going on inside the structure of the building, which may not be apparent but which may be there at all times, readjustment of the stresses in the columns and in the walls and beams. I believe a building that is on a floating foundation is subjected to such a condition of internal change while that foundation is settling, whether in a greater or lesser degree, but those movements and their effects are something that we have not yet got to the point where we can observe them or measure them, but we do know they are

there. They are evidenced at times by cracks appearing without any apparent reason for the cracks.

If any structural changes due to settlement would naturally occur to the largest extent following the periods of maximum settlement, that would not terminate the period of all changes. As I have maintained, there may be changes going on this minute over there in the structure, walls. I prefaced the whole matter by saying I don't know, but I say there is a possibility of all that. I could not agree that the period of least margin of safety in every respect is during the periods of great settlement rather than in those periods when the settlement is comparatively negligble, because I maintain there may be movements changes in the stresses, distortions going on the walls and columns after the settlement practically has ceased. It takes some time to transmit these forces from one part to another, gradual changes in the masonry, cast iron and wrought iron construction such as you have
551 over there. That is why I illustrated it by the fact that cracks appear sometimes without any apparent settlement. That is the best proof of such a possibility. I say I could not tell, these things might happen and might not.

A building on caissons, caissons to bed rock, does not settle. From the time the building is completed I think all chances of contraction in case of setting of the cement is over, so I might say a building on caissons on bed rock doesn't settle.

552 ERNEST R. GRAHAM, a Witness on behalf of Plaintiff, testified as follows:

Direct Examination.

I live in Chicago and have been engaged in the occupation of architect for forty years. I started with D. H. Burnham & Company and have continued with their successors. They have all been engaged in very large building operations in Chicago and throughout the country and have built many very large structures, including—in Chicago—the Illinois Trust & Savings Bank, Continental Bank, First National Bank, Wrigley Building, Union Station, Marshall Field's buildings, Railway Exchange, Insurance Exchange and others, all running from sixteen to twenty-one stories, and I have had similar operations in other parts of the country. I

am acquanted with the Chicago Auditorium Building and have in the past had work done there under my direction. I have seen the photograph introduced in evidence in this case, and I know the character and construction of the building in general. The building was erected at the time when very tall structures as we build them today were not constructed. It was built on a floating foundation with cross timbers resting on the soil. On this foundation concrete was placed and cast iron columns for the inner supports, with masonry walls for the outer supports. Owing to the very heavy dead weights of the exterior masonry walls and especially of the tower, the building has had a very uneven settlment from its inception. I no of no structure of that type which has been constructed in that manner in the last fifteen years. The
553 change from the type of structure of the Auditorium was made to a new and different type of construction within the past twenty-five years. It has been superseded by piles or caisson foundations and steel supports. That is what is known as the modern, steel skeleton type of construction. It is usual to have interior columns rest on foundations of their own, except in special cases, hut in a case like this where the exterior walls were largely a dead load and the interior column to be much of its load, calculated as a transient load, the dead load naturally settled the soil very much more than it would on the other columns. The exterior walls would naturally settle more than the interior columns with this character of foundation, leading to unevenness of settlement throughout the building. I have looked at Plantiff's Exhibit 38, being a table of levels that leads to excessive distortion in the structure itself. In the photographs I have observed that various struts and connections are broken and attempts at repairing them. If the building is going to remain, it should be completely reconstructed, but that is a very difficult thing to do, because of the character of the original construction, and from the fact that it is on a floating foundation with cast iron columns and cast iron lugs.

I had occasion to put in an extra set of boxes in the building some years ago for the opera. I happened to be one of the directors. When I put in the boxes and took out some of
554 the struts, I found several lugs had broken off. Wherever there is a broken lug it is very unsafe and liable to cause great damage. If they are going to repair the building at all, they should take out the whole inside and reconstruct it. No one can tell where those lugs are broken or what damage

it is going to make at any minute. The building is not susceptible of being repaired in parts without taking it all down and re-arranging the construction, putting in steel and new foundations. I wouldn't care to undertake putting caissons under a foundation of that character, because of the very uncertain condition of the entire interior. It would be a very expensive and very hazardous thing. If you jack up any of the outside foundations, it would have to be done one here and one there, if it were done at all. Any possible change in the settlement might let one of those lugs off and you would have a lot of trouble. Just how extensive when it starts, no one knows.

The effect of the erection of a building with caisson foundations across Congress Street from the Chicago Auditorium would be to cause some disturbance in the foundations of the Auditorium and it would be very liable to accelerate the settling of the building and might have an effect upon the moisture in the foundations. I do not know just the level at which those cross timbers are placed with relation to the water level. Of course if the moisture were taken out of the foundations, they would quickly decay; so long as the moisture remains they are all right. If they were about 17 feet below the street grade, they would require constant watching at
555 least. If the moisture was withdrawn the foundations would rot and the building would go. The rapaidity of that process depends upon the extent to which the water was removed. If the water level were below the level of the foundations, it would go very rapidly. I think it would commence to show in two years.

I am familiar with the architectural character and arrangement of the Auditorium. It is an obsolete structure from an architectural point of view. The general planning is not such as to bring an adequate revenue compared to what would be done today. I do not think the building would be worth anything at all in case of its removal. I do not think the salvage would pay for the cost of removing it. In my judgment the Auditorium Building does not add anything to the value of the ground it stands on, as the building now exists.

Cross-Examination.

I have known of the settlement of the building from the very first. I first came acquainted with the Building about thirty-five years ago, when it was built. I saw it built and

was then in the practice of my profession in Chicago. I had just come here at that time and was with the firm of Holabird & Roche, with whom I stayed about two and a half years. I do not know what the building cost to put up per cubic foot. My best opinion as to what it would cost per cubic foot in 1887 to 1889 would be about 30 cents, and
the reproductive cost of the building today about 50
556 cents, except that you couldn't reproduce it today. You would not be permitted to. You would have to put in very much better construction and foundations and that would cost so much more. When I did this work in the way of installation of new boxes in the Auditorium, I went there personally and oversaw the work. I remember Mr. Paul Miller (sitting here behind Mr. Cooper) being there very well. That was when I first saw these broken lugs under the balcony. I think some of them had been repaired, but am not sure. I do not know when those fractures took place. They would all be interior columns. My statement of opinion as to the safety or unsafety of the building, due to what I found at that time, embraces the entire structure. I have examined some of the steel construction and some of the foundations and the struts that related to the particular part of the work I had under construction at that time. That was where the boxes now are on the main floor in the theatre part of the building. I made no examination under the hotel or office building.

I said I had not known of any buildings on floating foundations of any consequence being constructed during the last fifteen years. Before that time they were. I do not recall any buildings of ten stories or thereabouts constructed more than fifteen years ago with cast iron columns that are still standing, but I am very sure there are such. The Monadnock Block is not such construction. The north half of the Monadnock Block has not cast iron columns. That was built by my firm. It has bearing walls, floating foundations and
steel columns. I do not know what is the material of
557 the beams, girders and trusses in the Auditorium; I think they are cast steel though. The outside walls are made of stone and brick. The thickness of the stone varies somewhat as you go up.

558 CHARLES E. FOX, a witness on behalf of the plaintiff, testified as follows:

Direct Examination.

I live in Chicago and am an architect. I have been engaged in the practice of architecture thirty-three years in Chicago. Up to about 1905 with Holabird & Roach, and since then in independent practice with my own firm, Marshall & Fox. My professional training and education were in public school first and then a civil engineering course at LaFayette College, Eastern Pennsylvania; architecture in Massachusetts Institute of Technology. In the practice of my profession here in Chicago the character of my business has been largely in large steel, iron and steel buildings of the loop character. When I was with Holabird & Roche I was connected with the construction of the Venetian Building on Washington Street, across from Marshall Field's; the Old Colony Building, Van Buren and Dearborn; the Monadnock Building, Dearborn between Van Buren and Jackson; the Marquette Building, Adams and Dearborn; the Adams Building, Adams and State; and others. Those are all very large and high buildings. Most of them are limit height buildings under the ordinance, 260 feet. With Holabird & Roche I started out at first in the drafting room superintending the department; then I went back in the engineering department, then was one of the superintend-
559 ents, then I did the writing of specifications, making of contracts, part of the time under Mr. Holabird and part of the time under Mr. Renwick. I am familiar with the Chicago Auditorium Building. About 1915 was the first close inquiry I made into the building. Mr. Clinch asked me to investigate the integrity of the construction of the Auditorium Building, with two ideas. One was to determine the cause of the trouble they were having with the fracturing of struts and lugs, and with the integrity in general; and to safeguard the structure as much as possible against the continuance of scarce headlines in that respect, in their directorate and among their employes; and for the other purpose of later on advising them what they ought to do with the property, with the idea of rehabilitating it, reconstructing it or replacing it. From that time on down to the present time I have continuously been in touch with

it and made studies and examinations of it with respect to these matters.

From an architectural point of view the Auditorium is not a successful solution of the problem of creating or providing a modern, effective, efficient building on that site for the highest and best use of the property. It is entirely obsolete in type from an architectural standpoint. Its type of construction is obsolete. It is badly adapted to furnishing the maximum of security and rigidity in the structure. It has certain elements that under a slight change in the existing conditions might become very, very dangerous. It
560 does not produce good, well lighted, well ventilated, effectively arranged space. It is a comparatively expensive property to operate in comparison with the revenue it produces, and, as an architect passing on it simply as a building item, I would say it encumbers the site. It is a liability rather than an asset. It has outlived its uses so far as productivity is concerned.

From an engineering point of view, integrity, the matter of safety, isn't a hard and fast line, unless you couple it with a definition of real engineering safety, which consists of a definite knowledge of all the factors which enter into the engineering problem. A determination of all the loads and strains and the provision of the necessary amount of structural material to meet those loads and strains, that is safety, if you could do that. An engineer says a thing is not safe. If it is not definitely safe it is unsafe. In my own mind I visualize it as a zone. Up to a certain point you can say a thing is definitely safe. You don't know about the next line. That is in the zone of non-safety. You proceed through that zone until you get to the full depth of it and get to the point where you can say definitely the thing is unsafe. Between absolute engineering safety and absolute non-safety, there is that zone which comes in for a business and architectural opinion. Below that zone you know it is safe. Above that zone it is unsafe. Within that zone you are liable to attack on the basis of an error in judgment.

561 As to the elements of unsafety known to exist in this building, that was the first point that confronted me in making this inquiry in 1915. I arrived at my judgment in that matter by a combination of various factors. The first was the support of the building, namely, the foundation. That was definitely proven to have been inefficient and improper by having failed to the extent of letting a settlement

of 28 inches occur in the building. It is there. The next question was the question of what is the shape of the steel or skeleton interior, supporting columns and beams and girders and joists, I-beams that form the skeleton part of the structure. I started an inquiry on that, gave Mr. Parker certain things to find out, points to follow up and determine the facts, and finally came to the conclusion that that structure had two very bad elements of deficiency. One of them, the figure Mr. Parker determined, raised a grave doubt in my mind as to the efficiency of the original engineering figures on which the size and character of steel or iron was based. That would be in connection with the manufacturing and testing methods in vogue at that time. The second important item in the strength of the interior of the structure was the absolute impossibiliy of determining the strains that the warping of the structure would throw upon the various members, the warping produced by this tremendous difference in settlement of 28 inches, which would put a twist in the steel skeleton, and in meeting that twist there was
562 absolutely no telling where the strain would go, this direction today, a lug might let go, and it would take another direction tomorrow; might establish a bend in a beam today, and tomorrow it might straighten out. With those two factors, the original apparent deficiency in figuring, irregularity of the members in their bearing strength as determined by Mr. Parker's figures, for instance, over three or four beams, one would be sufficient for the load we estimated might be thrown upon it, the next would show an absolute deficiency, and the next one would be a little stronger than necessary. In order words, an irregularity that suggested a different method of figuring in those days over what our engineers use now. But the important factor was this absolute uncertainty on account of warping. With those two factors I put the skeleton structure into the doubtful column.

Then we take up the matter of the walls. I had Mr. Parker make some figures, and made an examination myself. I made up my mind the walls were questionable for many reasons. In the first place, the exterior walls are stone veneered walls. In other words, there is a piece of stone ashlar set on edge, facing the outside face, backed up by brick work. If that ashlar is two feet in width it would be backed up by 15 courses of brick. You have 15 courses of mortar which are subject to compression. This course of ashlar on the face has no compression or joints susceptible of compression.

Therefore you have a titling action that is absolutely
563 of no account under regular normal loads. If any of that masonry is thrown under especially heavy loads approaching failure, that ashlar will operate to help overthrow the wall. It isn't the ideal type of wall to bring out the maximum strength of the backing masonry. Certain determination of loads showed that in a great many place the load factor was away up above the normal allowable load as set down in the ordinance, using the ordinance as a measuring stick of good engineering practice. The walls were heavily loaded in places, of a type not particularly adapted to heavy loading, and the areas were cut down. Some of these walls had flues in them and voids in them. On top of all that, these beams were built into the wall, and the wall in places had been subjected to a very heavy settlement. In other words, every beam built into that wall was acting as a pry or crowbar tending to break the wall down. The beam originally setting level, with the end moving down, it causes a prying up. The other end would be resting on a column which would not settle at the same rate as the wall. This whole thing put together caused me to doubt the validity of the construction of those outside walls.

Then we take the theatre construction. We go into the matter of the balconies, the construction of the theatre. In the first place, it is an axiom of engineering that steel unprotected by fireproofing is a worse factor against con-
564 flagration than wood. We found those balconies unprotected. The steel in them is unprotected. They are built of wood, and when it comes to a matter of replacing the wood with concrete, our steel is too light to hold it. A result of the analysis of the construction of the theatre is that it is a liability, it has got to be replaced if the dictates of humanity and safety to the public are consulted at all.

When it gets to the architectural end, as I said, the layout and distribution of space is obsolete and insufficient. The number of rooms created by the building is deficient for a successful operation and meeting of the expenses of taxes and operation in a location of that kind. If the highest and best use of that property is to be looked to, then it takes a much bigger earning capacity than any that is provided in this hotel, or in the office building, or in the stores and in other parts of the revenue-producing space. This did not come out in a minute. I started out with the idea that

the building could be reconstructed. That is what I tried to do, and it was my first thought in my first talk with Mr. Clinch; I thought something could be done in the way of rebuilding and reconstructing, to make something in the way of a successful financial revenue producing property as a result without materially disrupting the character of the improvement. As I went into it, these things accumulated, these things I have skeletonized here, and forced me to a totally opposite conclusion when I wrote my report to
565 Mr. Clinch. My first report or correspondence was in 1915. The real report that followed the two years of observations and analyses and consideration was really in 1917. The conclusion which I reached at that time was that this building would have to be replaced with a new one in time; that it would be kept as it existed by scrutiny, careful watching, and such repairs as might develop to keep it in shape, but that it would only be a temporary matter so far as the existing building was concerned. I have continued to study that building and make investigations from time to time, practically down to the present time, and just before this suit was instituted, and down to the present time, have given special attention to it. My opinion as to the possibility of maintaining that building as a sound structure, is this: I don't think it is right, from the viewpoint of safety or engineering or financial judgment, or business judgment, or architectural judgment, to attempt to maintain that building on that property.

As to what would have to be done to the interior of the building in order to just make it safe, I have already made by limitation on safety. In other words, a thing must either be safe or it cannot be called safe from an engineering point of view; and I don't think you could make that structure engineerally safe without taking it all down. Because you have all these warpage strains in the first instance. You cannot tell how far they have gone or what damage they have done without examining each separate piece or each local
566 condition. In order to do that you would practically have to take the building down in the process, or practically destroy it. You have also a feature that I have not given very heavy consideration to, and I don't think anybody has in connection with this, and that is the pioneering character of the engineering practice and experience that was brought to bear in the creation of this building. Building

engineering as a profession was in its babyhood at that time, and this building was one of the first instances, in this part of the country at least, in which an opportunity for modern building engineering practice, as we know it, was brought into effect. The modern structural steel as we know it was just beginning. It began almost in the years that this Auditorium was started and did not come into use as a common building construction until several years later, two years later. And the consequence is that the characteristics of the material were not thoroughly understood. The methods were not understood, and necessarily there was a lot of pioneering done. Nobody can tell how far that went, unless you take each individual piece of steel and calibrate it, determine its size, and determine the physical character of the material that went into it, iron or steel if either one of them, and what character of iron or steel, because before our modern steel was developed there were as many kinds of steel as there were fixtures that a man could make. What the material in that building is I don't know, whether it is
567 steel or iron. The figures have been made on the basis of steel, because that seemed to be the fairest thing for the structure, but there is undoubtedly a lot of iron mixed in, because they did not turn out steel at that time in volume, such as might be called for in a building like that, and I know that as late as 1893, when we put up the Old Colony Building, we had to watch the shipments of steel to see that we did not get some iron beams mixed up in it, and I imagine that earlier shipments had that trouble to a larger degree. Now therefore, I say that to be absolutely safe from an engineering point of view, so you would know what you were doing, you would have to go into every item that entered into the skeleton of that building. There are certain things we know to be absolutely unsafe.

When I had Mr. Parker go into the fine-haired investigation of seven distinct items of structural material, and finding six of them deficient, I put that whole structure into the discard, as it were, as not being proper to be incorporated in the underlying expenditure of the million or two dollars which it would be necessary to reconstruct the building, to rehabilitate it by the modern process of tearing out and replacing in the structure as it exists. As to requirements of the city officials with respect to fireproofing, when we make an alteration, rehabilitation of a building, we have to accom-

pany our drawings with a sworn certificate to the effect
568 that those drawings have been prepared in accordance with the requirements of the city code, and to my knowledge with the requirements of that ordinance in all particulars, and I must sign those personally. That means that when I go in to take a rehabilitation operation of any magnitude, I mean involving 33 per cent or such a matter of rebuilding, I have got to make that building comply with the ordinance or go to the City Hall and explain why I did not, or I cannot get my permit. There are features now known to be defective of such a character in themselves and with the parts directly connected, and which would be affected by that process, that would necessitate a very substantial amount of fireproofing, if we should undertake such changes; and the fireproofing, even confined to those features of the building, would add substantially, undoubtedly, to the weight of the structure upon the columns and foundations.

I have given consideration to the question as to what, if anything, could be done with the foundations of the Auditorium Building. The foundations have proven themselves to be improper because they failed to support the structure, allowing some 28 inches of settlement to occur since the building was built. I went into the question of the foundations very carefully through the whole interval that I have been investigating the building, and they are the controlling factor of any alteration scheme that you could endeavor to develop, and a factor that I so far have not been able
569 to overcome. Ordinarily a floating foundation has a tendency to grow more rigid as it gets older, because the supporting soil dries out, and as it becomes drier it supports the structure more adequately. That probably operates in the case of the Auditorium and is perhaps the reason that the settlement has reduced from year to year, but the trouble is that the drying out means that the water is disappearing, and in the case of the Auditorium foundations the minute the water disappears your foundation is ruined, because the water is essential to the preservation of the foundation timbers against rot. Now, these foundations being inadequate in area, which is demonstrated by the fact that they do not hold the building up, means that there is a greater pressure per square foot of ground surface that is supporting the structure, and consequently these foundations are more likely to react to any disturbance that may occur in the neighborhood. Unfortunately, a great deal of the area around the Audito-

rium Building is unimproved with modern buildings of magnitude, which means that in all probability in the next decade buildings of magnitude will be built in this neighborhood, since that course of development has taken place all over the loop. If hardpan caissons or rock caissons are built in this neighborhood and water is withdrawn from underneath the Auditorium foundations, there is always withdrawn some of the soil, since this water is only mud; and with the witdrawal of water it means settlement on the foundations. As
570 far as replacing that is concerned, I put that problem up to our engineers and made that the particular item of inquiry of Mr. Parker and Mr. Ritter, and at the end of a period we were all faced with the idea that we have not seen daylight about putting caisson foundations under this building. Mr. Giaver, the engineer who just died this week, was also consulted in respect to this matter. The difficulty in putting caissons under the foundations of the Auditorium Building is, first and last, supporting the load while you are doing it. For many years there was no method known in this town by anybody of supporting a building of magniture while you put a caisson foundation in place of a floating foundation, and for many years that problem could not be handled. For the last ten or twelve years it has been handled, and very successfully in some cases, and I know of no failures but I had one job on the border line, that taught me personally, as an engineer, the difficulties of that very problem, and it was that care of putting foundations under the south end of the Old Colony Building. There we cut them out without holding the building up. That was a line wall floating foundation. The foundation was built on steel beams in the ordinary type of grillage supporting columns permanently on the lot line. By virtue of the lack of balance in unloading this raft—in other words, the end against the wall was loaded more heavily than the end that had a chance to be spread out, and the consequences were that that line foun-
571 dation settled very materially, and Mr. Lathrop gave orders to have this wall handled with caisson foundations. Mr. Lathrop was the owner of the building, or representative of the owner. Four caissons were put down on the line and underpinned under the foundation and the building supported on it. During that operation a tremendous settlement occurred. The steel skeleton building, that is, the walls supported by a skeleton, stood up remarkably well. Some of the interior partitions showed a great deal

of settlement, but that was just a case of superficial repairs, you might say. At that time we had men on all the floors. This was done on Sunday, so there would not be a public demonstration of the experiment. Mr. Sooy Smith had the contract. We had men on all the floors and they would signal the results of our movements down there, by telling us how many doors cracked, or windows cracked, on our floors. The difference in the conditions of that operation and the condition at the Auditorum was that the Auditorium, in the first place, has no steel columns that are adequate to take hold of to hold that building up. The foundations are very shallow as compared to caissons on hardpan or rock, and yet they go through the hard later of clay, so they are deeper than the ordinary floating foundation. The support of that building during the installation of the caissons would have to be had on the ground outside the area of the foundation, because that foundation is not the type which you could punch a hole in, as was the case in the foundations we have been handling. You would have to take that foundation out,
practically destroy it, and build a new raft completely
572 on the soil of adequate superficial area to hold this load
on top of it, and then you would have to dig down into this untried ground, where you know the chances of striking quicksand are considerable, and get this caisson in place, and then reload the upper work upon it. The columns in the Old Colony Building were steel. I know of no operation in which caissons have been put under any building of any size, where the interior structure of the building is cast iron columns.

I did at one time prepare sketches, which gradually became elaborate into a form you might call plans, for the improvement of this property all along the line. That is, I prepared sketches for the building as it now is, to show what it had in it, and then as rehabilitated, in order to figure the revenue, and see what it was producing, and then entirely reconstruct it, the best we could do with it, and then I made sketches for an entire new structure on several hypotheses. I made at one time a plan that involved the retaining of the tower walls of the building and made a study in connection with it. That plan finally resolved itself into a retaining of the auditorium theatre and the general arrangement of the building, the hotel and office building, but with new lobbies constructed for the theatre, and with hotel occupancy provided for the office building, with a moving of the hotel lobby onto Congress street, instead of Michigan avenue, and the application of

the space on Michigan avenue for stores, where the lobby
573 now is, and the whole rehabilitation of the buildng on that basis, putting the elevators on Congress street, and developing the upper part of the building in accordance with that arrangement. The fundamental structural difficulty is the inefficient distribution of space, from the hotel standpoint, that now exists on the property. In other words, the piece of property that is along Congress street is too wide for one set of rooms and too narrow for two sets of rooms, and has no light against the theatre walls, and very little use is made of it. The ceilings are too high, because they match the office building. They are a lot higher than is necessary for a hotel. Consequently, you cannot get as many stories as would be efficient to get in. And the front building, on the Michigan avenue side, has beautiful rooms on one side of the corridor, and the other side of the corridor has very deficient and inefficient rooms and very badly lighted, and you cannot get in added stories because of this defective foundation and defect in the wall bearing capacity, among other things, and so you are handicapped all along the line with every turn you make. Assuming we did such a thing as I have just been describing, I figured at that time, provided you had good luck in bringing everything up to date that you could, that the maximum life of that building would be twenty years. At the end of the twenty years you would be faced with the same fundamental problem of the unsafety of the building as a whole, and the necessity of doing something with it. You have not solved it by doing that.

574 I made other plans for the rehabilitation and reconstruction of this building. Those are the plans which have been introduced in evidence as Plaintiff's Exhibit 43. They are sketches more than plans. They are sketches that were developed in the study of this problem, for the purpose of giving the president and directors of this company advice as to what was best to do, and this was explanatory of the verbal report we made. I am a member of the board of directors of the corporation. Now, one development was a new hotel over the entire property, to the exclusion of all other property except stores and other occupancy necessary to the hotel use, and that produced, as I recall it now, 2,000 rooms approximately. The principal purpose of these studies was to develop all the revenue that could be developed from this expenditure of capital, and there has been no attempt to work out details beyond the point where we could be sure of achiev-

ing a certain rental area. We have developed four stores on the grade floor, a coliseum or convention space on the basement, a mezzanine made up of a combination of hotel space, in the shape of dining rooms and services and concessions and club rooms, and in another floor provided dining room service. Then a ballroom level, and then a typical chamber floor that carried 103 rooms on a floor and went up to the limit of height permitted by the ordinance. We figures on 2,000 rooms on this plan, and as I recall it now, the capital involved was about fourteen million dollars. Then we
575 made another one, where we just developed half the property, leaving the other half for the development of the theatre, to see how much revenue we would receive on the amount of capital that it would take to develop half the property. Those are the only two there are here. This represents two of a half dozen studies, and it represents the latest in point of time of anything that was put in written or draf form.

I have here seven of the photographs introduced in evidence as Plaintiffs' Exhibits that apply to the foundation work. There is one hole that was excavated, exposing the grillage timbers, and six of those photographs refer to this excavation and an excavation adjoining. Exhibit 47 shows the timbers of the two layers of grillage, and also shows what looks like a third layer on top of them, which has been determined to be a plank box that was formed to contain the foundation concrete and has been left in place, because it served no good purpose to remove it. This shows the projection of the timbers, and shows them to be—and they, in fact, were by personal inspection—in absolutely sound condition. I saw it.

Exhibit 52 shows a similar situation with respect to the foundations and has an additional significance as showing the liquid character of the soil which surrounds these foundations. When saturated, this soil flows very readily, and that is of importance, because if that is characteristic of the
576 soil underlying all of these foundations, then the danger of disturbance from adjoining constructions, like caissons across the street or in the neighborhood, or a subway passing the property, is greatly increased. And, of course, with this type of foundation, that disturbance is the next thing to be feared after the integrity of the foundation itself. Exhibit 50 applies to the same subject matter, as also does 48. The additional significance of Exhibit 48 is that the

ground was so plastic that the supporting soil flowed out from underneath the catch basin, even though there was evidently an effort to keep it there by braces and sticks. In other words, it not only did not stay there itself but it could not be held there.

Exhibit 54 shows the general character of the basement with respect to exposed tile and the general hap-hazard character of piping, wiring, and that sort of thing, but has particular significance in the matter of settlement. It shows the wall on the left of the picture as having gone down and carrying with it the basement floor, to an amount that would appear to be 10 inches or more. The straight edge shown across the basement has been leveled with a spirit level, in order to show the amount of this settlement.

Exhibit 70 shows the character of the supporting structure underneath the balcony. It shows fractured lugs and the method of repairing them. It shows the cracks in the adjoining tile wall, owing to this movement. It shows a fabri-
577 cated support for a part of this steel, bolted in place at the right hand side of the picture, and shows the unprotected and unfireproofed character of the steel structure.

Exhibit 69 shows the underside of the roof, and the roof trussing, un-fireproofed and exposed.

Exhibit 60 shows the underside of the balcony framing. It shows it unprotected and un-fireproofed. It shows broken lugs of cast iron, with a substituted support of frabricated structural members beside it.

Exhibit 55 shows unprotected cast iron columns, unprotected structural steel girders. It shows the method of taking the load from a girder by the use of wrought iron lugs and wrought iron stirrups. That was a method applied in order to overcome, as far as possible, a fracture. It shows the use of wood in the floor system.

Exhibit 56 shows Mr. Wade standing under an exhaust pipe in the basement, with just enough head clearance so he can stand erect, and if he moved forward a litle bit he would have to get down on his hands and knees. Evidently intended to show the inadequacy of the basement. I was in the building when this picture was taken. I think I was in the room when that particular picture was taken. I was not present in the room when every picture was taken. I was wandering around the building, and some were taken when I was not there, but I recognize most of them.

Exhibit 57 shows part of the basement, with an unprotected cast iron column, exposed tile work of the ceiling.

578 Exhibit 58 shows part of the basement, being the ice chamber of the cooling system for the cooling of the theatre. It is chiefly significant as showing the complete obsolescence of many of the items in this construction. This is a pit intended to be filled with chunks of ice, over which the air would be drawn, to ventilate the theatre. It is the only one in the world I ever heard of.

Exhibit 68 is a basement photograph, showing the conscription of head room. The significance of that is that the space behind Mr. Wade is in use as a pantry, and indicates the difficulty of using the space for hotel service. The management is compelled to use such space in the operation of the hotel in lieu of having any better.

Exhibit 65 shows most particularly an item of space that meets this description. It is the dish pantry, glass pantry, in connection with the Michigan avenue dining room service. There is a scant six feet of head room. There is an uncovered steam pipe, which goes right over the pantry. It shows the impropriety of the space for the kind of use that it is being put to.

No. 63 shows what was apparently intended to be a reinforcing of a structural steel column. So far as I have been able to determine from inquiry, the oldest employe around the establishment does not antedate this item of structural reinforcement, and it is one of the items which makes me in doubt as to the type of engineering intelligence that was brought to bear upon this structure originally.

579 This photograph, Exhibit 61, shows the underside of the balcony, the unprotected and un-fireproofed character of the steel, the questionable method of support of the plaster ceiling, but particularly the method of constructing the floor of the balcony, which is shown in this photograph to be constructed of plank. In other words, the balcony in this auditorium is of wood.

Exhibit 59 shows the amount of fireproofing used on the cast iron column, and also the deficiency of head room in the basement, and also the character of piping and wiring.

The plumbing in this building is very old and obsolete, though it has been kept in service by adaptation and repairs, but it has reached a point where the substitution of a new system would be necessary, if any high degree of efficiency from the property is expected.

The elevators are absolutely obsolete, and should be replaced. They are increasingly difficult to keep in service, and they have just about reached the end of their usuable life. I have not figured the building requirements over, to see whether a useful size of elevators could be maintained after the enclosing hatches are fireproofed in accordance with the law requirements; but in any event, I would expect that the floor supports would have to be reinforced, to bring them up to the supporting requirements. It is possible to do that, but it is a very expensive item, and when you get through you haven't got very much.

580 I know what the position is taken by the city authorities with respect to the building ordinance in the event of extensive alterations or rehabilitation of a building of the character of the Auditorium Building, that is applicable to our problem at the Auditorium. The Building Department use permits for theatre alterations under the ordinance itself and under several special ordinances which make exceptions in the case of old and existing buildings. I have discussed that with the department in this case, and my opinion of our situation is that so far as the Auditorium alterations are concerned our rights as to areas and access and distribution of space would hold under the old ordinance as an existing theatre; but so far as materials and methods of construction and local details are concerned we would have to comply with the ordinance, we would undoubtedly have to comply with the fireproofing provisions of the ordinance. I have made estimates and calculations with respect to the internal charges that would be necessary in any event in the building. Those changes would be of such character and extent as to require us, under the building ordinance and the interpretation of it by the city officials, to fireproof parts of the building that were reconstructed, and also parts that were not reconstructed. With respect to the building as it now stands, the city officials have been concerned about some items and have wanted us to change them. For instance, we have yearly been notified by them to provide additional fire escape facilities, and some time ago I went over and represented to them the facts as I knew them in this situation and asked them to

581 hold off from any drastic requirements on fire escapes until this litigation was settled, and the general matter of rehabilitation and replacement. And they did hold off. This year they have been to the Association again and I understand that the building is adding a bridge from the serv-

ants' quarters and providing some other additional fire-escape facilities to meet their minimum view in the matter. They have also indicated various items of access, elevators, stairs and that kind of thing, but only in the way of discussion and questions. They have not served notice so far as I know to make any radical changes. I have assured them the plans contemplated drastic change in the whole situation over there. They have preferred taking the position awaiting that outcome.

Cross-Examination.

It would be possible to put fire escapes on this building. The last man who talked to me about other items they would like to have changed was Bob Knight, an assistant deputy commissioner. He did not come around and see the building. I talked to Mr. Knight myself about the position they would take with reference to alterations. He hasn't objected to me specifically recently about any particular item. They have simply asked about the Auditorium, the general situation, "What are you people going to do over there?" There aren't any specific matters they have objected to about the Auditorium that I know of that are pending except this fire escape. When I am testifying as to the position of the city authorities

I am not attempting to say what is in the ordinance, I do
582 not know that the ordinance provides for complying with
the present requirements when there is a change of occupancy of a building. That came up when I talked to Mr. Knight this morning again. He spoke about a change of occupancy as being one of the factors they took into consideration, I never knew of that coming up before in my experience. Mr. Knight did not come this morning to complain about the building. I called him up to find out what his attitude would be if alterations or rehabilitation would be undertaken, with reference to the general attitude of the city on the subject matter, how extensive we could go. I didn't put my questions in such a way to make him think we were or were not going to do it, didn't want to arouse their activity in the matter. He stated that for the purpose of my investigation I could proceed on the basis that if we made a 50 per cent alteration of the hotel and office building we would have to comply with the ordinances in all substantial matters, and then with reference to the theatre he went into the various ordinances I haven't attempted to go into. It is not a fact

that all I know about it is what Mr. Knight said to me this morning, and that I was making inquiries from him for the purpose of using them in this lawsuit. I know of their attiture by thirty years' continuous contact in getting out these permits. The City Hall attitude is something I have never been able to forecast; no matter what building we build, if there are any questions about it we go over there, and without asking a direct question try to learn what their attitude is. I know what their attitude is on the basis of past performance with reference to auditorium alterations. Mr. Knight has been there for the last twenty years, I would say; no
583 change about his tendencies so far in my experience. The commissioner changes but the personnel is remarkably stable; just stays there, apparently. The ordinance is so elastic and so much depends upon their personal attitude and pressure from various interests that happen to be there on it, that when special questions like that come up it isn't safe to take your previous experience. This testimony I have given here this morning of what Mr. Knight indicated would be the attitude of the city is what Mr. Knight told me this morning.

On motion of Mr. Miller, counsel for Roswell B. Mason, Guardian ad litem, the testimony of the witness as to his conversation with Mr. Knight was stricken out.

The Witness: I did not say that the moisture has already left the timber foundation under this building. There are numerous buildings in Chicago that are resting on wooden piles. The tops of those piles come up as high or higher than the wooden foundations under this building. I suppose there are instances where buildings have been erected on caisson foundations directly across the street from buildings on piles. There are instances where buildings have been erected on caisson foundations alongside of or very near buildings on piles. As to any instances where, because of the erection of buildings on caissons the water ran off from the pile foundations, and the pile foundations rotted, I would not expect that because the interval is too short. Our whole interval since the first caisson foundations have been put in is only a matter of fifteen years, say, twenty years at the outside. In that length of time the ground would not be relieved
584 of its water by that, I wouldn't expect it to from the point of rotting the piles. I wouldn't expect to see that from the construction of caissons. If that caisson hole were dug and left there permanently, not occupied by other material,

then I would expect it to run off in a very much shorter interval than twenty years. If the hole is filled with concrete, I would not expect the result to be to lower the water level an appreciable amount. It would take many, many such operations, continuing over a term of years, to depress that water level until it began to bring about the rotting of the piles. I am not at all certain that is exactly what will happen if you take time enough. The city water level in the downtown district today is feet lower than it was thirty years ago. The depression in the water level is increasing every year by a very small amount. If a building were erected across Congress Street from the Auditorium Hotel, I would say it would take a great many years before that would result in the water running off from the foundations under the Auditorium. I wouldn't say about twenty. I do not.

The defects I have described in the Auditorium Building, from the arrangement of space and from the fact that the walls are so thick that you can't use to the best advantage the inside space, was one of the elements which led me to declare the building obsolete architecturally. The same facts existed when the building was built in 1889. But the knowledge of their obsolete character did not exist. There was just as little light in the rooms at that time as there is today,
but there weren't enough well-lighted spaces to make it
585 comparable, so that fact was not appreciated. I do not
mean the building has changed, but the art has changed. Building has become of a more definite character with respect to certain things, which make these things obsolete.

From the money-making standpoint, the obsolescence of the building, among other things, destroys its usefulness. The character of the building is no longer efficient,—I don't know whether it ever was,—to produce remuneration sufficient to take care of the overhead,—taxes, for instances, which were a joke and could be disregarded and were negligible in 1888, but which in the lapse of time and growth of the spending power of our city, county and state administrations, has become a very important factor in today's set-up of the property. My position is not that at the time this building was built, it was suitably arranged to bring the best results we could get from the property from a money-making standpoint. I will put that in another way: it was good enough. It was never so arranged in its interior arrangement as to make it the highest and best use to which the property could be put, since we know a better now, but it was good enough.

It was a tool do a certain work; it was good enough, and when it was good enough they stopped. The work it was to do was to produce an income to the satisfaction of the people interested. Apparently they were not looking for a big income from the property since they didn't have it. As to whether at the time it was built, in view of the fact the large auditorium was put in, it was more or less of a public enterprise,
586 I don't know as to that, except by its reputation. I understand Mr. Fred Peck was the head of the enterprise. It was built by the Chicago Auditorium Association.

These tests and figures made by Mr. Parker back in 1915, 1916 and 1917, to which he testified, were used by me as one of the elements in making my reports to the Chicago Auditorium Association. In making those reports I relied on the accuracy of those tests and figures only in a very small degree, because they were only one of the items that went to make up my opinion. They were confirmatory. I don't know whether you grasp the committment that I received as I understood it. That was to report on this proposition and tell the president of the corporation, and make clear to the directors, what in my opinion they ought to do with reference to this proposition; that is, safety first, the liability they were carrying in connection with it; and, second, development in the way of rehabilitation of the property, or a new building. The new building didn't come up until long after this committment was made with me. It only came up because I followed the route of rehabilitation to the point of disappearance. This committment, except for the question of the new building, was given to me back in 1915. Mr. Parker's tests and figures were simply a check-up. I made my own investigations, looked up the general character of the building, matters of settlement, what I could gather as to foundation and structure, usability, economy and effectiveness of space, desirability of the auditorium, and all other factors any man examining a building would want to know about to base an opinion on. Among those items was the steel structure
587 which, of course, I could tell very little about by examination. I delegated Mr. Parker to make a set of figures and make an examination from an engineering end and have Mr. Ritter confirm his findings. I was not interested as to whether this beam was 5 per cent overloaded or 10 per cent. I was interested if it was 50 per cent overloaded, but as far as the loading was concerned, slightly up or slightly down, it was a very minor matter. It wanted to know whether it indi-

cated a good, sound building as having been built in the first place. I did not make a report in writing regarding the Auditorium Building to the Auditorium Association in 1915, I wrote a leter about it. I will get a copy of it out of the letter files or letter book. I sent the original to Floyd Clinch.

It is perfectly possible for Mr. Thielbar and Mr. Mueller to examine these places where Mr. Parker made his tests. Those places are very trivial as to arriving at a judgment on the broad proposition. It would be the question of one beam or one truss if it were dangerous to the point of iminent failure. But the question I devoted my attention to was to get all the factors together, hundreds of them, observation, inquiry from the operating staff, the set-up of the books, "How much did you spend fixing this up, how much did you have to spend fixing that up," examination of plumbing, wiring, elevators, observation of repairs, deficiency in operation over a term of years, and got to the point where I made a report to the Auditorium Association of my opinion. I haven't made any examination for the purposes of this suit.

What I have done, when Mr. Fisher and Mr. Clinch told
588 me that this suit was on and we would have to support our position, I have asked all the men concerned in giving me my figures to take a look over what they had done and be prepared to support the data they had given me. I have seen no new data. The only thing I have seen is supporting data. Here is a statement made: "We found a beam overloaded in a certain place." "How much overloaded?" "I don't know exactly, but I think—" "Never mind about that. I want to know exactly what you can find out accurately, what the facts are. I don't care whether you were right or wrong then. Get me the real facts now." The important thing was when I made a statement of fact, I wanted to know it was right.

When I talk about the highest and best use of this property, I mean from a money-making standpoint, from a financial standpoint, and quite aside from the safety standpoint, which is the first item always. When I talk about the highest and best use of the property it is the use that will bring in the biggest return on the property legitimately.

There are several kinds of fireproofing that might be used under the city ordinances. Some of those are heavier than others. I do not know how many columns there are in the building; I never counted them; it would be a wild guess. There may be 150 attached to each column. Probably there

is a girder in one direction on both sides, and I would say a beam in the other direction, or on both sides. That is just normal. Certain of those pictures about which I testified showed places where there had been fractures and where those fractures had been repaired. I can't say whether any
of those fractures happened in the last ten years. To
589 my mind, they were unimportant, comparatively speaking. They were simply a detail of the operation of the building, and they reflected a deficiency in the construction, which I did not need those to tell me. By that time I had arrived at the conclusion that the frame of the building was obsolete, and in addition to that was deficient in points of strength in original designing. I did not care when these fractures occurred. They were weak enough to break and that was all I needed to know. I have been the architect for the building since 1915. I don't think that if there had been any broken connections since 1915, such as are shown in the pictures, they would have been called to my attention. The reason I say that is because this operating crew has become very skillful in repairing those fractures. I don't know it to be a fact that those fractures have not occurred in the last ten years. I never tried to determine. I don't know.

There have been several buildings erected here in the city of Chicago on floating foundations. There are a great many of them. In case of such buildings, the practice is among engineers if settlement occurs, that a set of levels are established and checked up from time to time, to see whether this sinking is accumulating rapidly in amount, or whether it is stopping. That particularly occurred with some buildings I am familiar with, with the additional foundations that followed this period we are talking about. In other words, any buildings that were built in the early nineties, like the Old
Colony, Monadnock, Marquette, in those buildings I was
590 familiar with the practice to maintain a watch on those buildings, and that watch was checked up must as soon as evidence had come forward of settlement, and was maintained until the settlement had practically ceased. I do not know of my own knewledge of any fracture of struts or lugs in this building that have happened in the last ten years. If a lug snaps off from a column, that does not necessarily affect the integrity of the column.

I have found in the vicinity of the Auditorium Building some of the worst quicksand that I have ever encountered. The Karpen Building was the very worst, and one section of

the Blackstone; and on the other side of it I was called in by Mr. Merriman to review the situation that he encountered in the McCormick Building. The Karpen Building is at Eighth Street and Michigan, a Michigan avenue front building, three or four blocks from the Auditorium. The Blackstone from the Auditorium is two blocks. On the Karpen Building, I got the quicksand where we expected to find hardpan; in other words, from 40 to 65 feet, roughly, below inside grade, or below datum, I don't remember which. It was down near the hardpan. At the Blackstone it was about the same place, but it was accompanied by so much water that we drained the water by digging our deepest caisson first and leaving it open and draining the water into that deep caisson for the entire operation of sinking the caissons on the lot; and this quicksand, which we later on found to be such a deterrent in the Karpen Building, now the Standard Oil Building, we were able to overcome by this drainage method on the Blackstone. When we used one caisson to drain the other,

it was not surface water we were draining. The worst
591 engineering problem to handle there was when we got this drainage caisson down on the rock. The rock was overlaid with a layer of boulders and gravel and very coarse sand, and that opened up a regular spring of water that came in from the lake on top of this bed rock and into this drainage well that we had dug, so we had to seal the bottom of it and cut out this drainage from the lake, and after that it functioned as draining this quicksand layer that was evidently capable of carrying water. You understand that most of this clay with quicksand under the foundations in Chicago is like rubber. It is impermeable. But in the strata of sand, that varies in size, from the consistency of quicksand, which is very much finer than ordinary sand, by gradations in size up to boulders that we found mostly on top of the rocks. Now, those layers will carry water and you cannot drain them as you can in ordinary sand.

Those are the only places I found quicksand on Michigan avenue. Except that with me the most important one in this problem was the McCormick Building. Mr. Merriman had charge of that, being the general manager of the Fuller Company, who built the building. I was in charge of the old Tribune Building, of which Mr. Merriman was the architect, and we encountered a ground situation there which later on was expanded into a litigation that lasted nine years. That is the reason Mr. Merriman came to me. Mr. Merriman had

this problem of collapse of caissons on the McCormick Building and he asked me if I would come over and look at it, having had this experience on the Tribune Building, in which we came out very nicely. I went over and looked at the
592 problem at the McCormick Building. It was a case of bad ground, and the very nearly complete collapse of the Steinway Building, which adjoined the McCormick Building on the west.

I cannot tell exactly when I prepared this plan for remodeling and using the present building, but about two or three years ago I hadn't gotten that far in 1915. It was subsequent to 1917, I would say. I can tell from this. I may be mistaken. (Documents were handed to the witness.) The various sheets are dated August 4, 1921. This is not the plan. Prior to 1921, and I would say subsequently to 1919. I just accumulated the data, and made fragmentary studies of the thing, and finally made a report to the Association under the date of 1917. Afterwards I put these things together and started to arrange a scheme for rehabilitating, which is the rebuilding scheme I have talked about. In this plan which involved the retaining of the present building, I left the auditorium itself as it is and schemed out a plan for a new lobby and entrance. I say I made that plan subsequent to 1917 and prior to 1921. I have got that plan somewhere. When I speak of plan, I mean the sketch; that is all there is. I don't know when that was made exactly but I can find out. I can make those figures exact when I get to the office.

When I came to draw up this sketch I found it practically impossible to make an attractive money-making proposition out of any such plan. The results were not consistent with the money that was required to effect the change. That was the difficulty. I did not try to study the question of caissons in connection with that plan, except to this extent, that
593 this question of the possibility of substituting caissons was a subject of investigations, entirely independent of any new building at all, new rehabilitation, because personally I have never been sure that that subject would not have to be handled, irrespective of any change, because I have never felt confidence in these foundations. I would not say I took the question of caissons up with Mr. Ritter back in 1915. In 1915 we started. It took us several years to arrive at the knowledge of the structure to the point where the investigation of the possibility of a new foundation was made. I can't tell the date when I took up the question of putting caissons

under this building with Mr. Ritter first; I would say about 1917, but I have no idea just when. It was an important matter in my mind about 1917, and as I talked to Mr. Ritter about all these matters in this investigation, I would say that about 1917 I first discussed this matter with Mr. Ritter. I didn't talk with Mr. Gaiver about it. Mr. Ritter took it up with him, and it was within the last year.

I think the result of our sketches for a new building is embodied in the exhibits already before the court. The preparation of any one sketch involved the preparation of many sketches, before you finally incorporate them, you might say, into your finished presentation. I made many sketches for the new building, very fragmentary in their nature, and then embodied them in one set. That is in Plaintiff's Exhibit 43. These sketches are not final plans, simply sketches showing what might be done with the property, different forms of improvement that might be put there. Their purpose
594 was as the foundation for a real preparation of a new project. These are not presented for the purpose of having somebody say, "Yes, build that building." They are for the purpose of saying, "That scheme looks good to us; go ahead and develop it." They have not yet got to the stage of being plans for the new building. None of the schemes outlined by these sketches have been officially adopted by the Chicago Auditorium Association. Exhibit 43 would involve devoting half of the property to an auditorium and the other half to a hotel. I don't recall how that scheme worked out from a money-making standpoint, as I figured it. I would say it can be so considered as resulting in the property being devoted to its highest and best use, the other plans were plans of devoting the whole property to one hotel 260 feet high. The upper two-thirds of the building had a court for lighting. There was no auditorium in that particular project. The courtyards were to light the bedrooms. I would not say that it clearly appears from the plans in which piece of property the courtyard would come unless you draw the lines. Part on each; no favoritism.

All these plans were naturally figured to work out a scheme for making the property as productive as possible. I directed where some of those photographs were to be taken, not all of them. Of course I understand they were taken for the purpose of use in this suit.

I have stated that in certain places the Auditorium Building is now unsafe from an engineering standpoint. One of those

places is at the northwest corner of the office building, where this column that was already spoken of has been found to be deficient in metal area. I presume the offices are full
596 of tenants, and that the people are going back and forth there all the time. Another place is the balconies and galleries of the theatre. They are unsafe from an engineering standpoint. Nobody can tell whether they are liable to fall down or not. They have passed the zone of danger that has been so since I made my first report in 1915, and should be done away with. The menace should be done away with, and should have been done away with before this. I know nothing about the lease to the Chicago Opera Association. I do not know that since that time the place has been full of people when the opera was there. I did not say it is unsafe both from the standpoint of falling down. I say no man can tell. When I say it is unsafe, I mean it is unsafe from an engineering standpoint, definitely, positively unsafe from an engineering standpoint, and when you say is there danger of its falling down, I say no man can tell unless you can establish some measuring stick by which I can tell whether it will fall down. I know of none from an engineering standpoint, it must be labeled unsafe. As to the rest, someone other than an engineer will have to answer your question. It is definitely unsafe from a fireproofing standpoint. That has existed since 1915. That is as far as my knowledge goes. I have been the architect of the building since 1915, I and my reports have so stated.

(Answer as to what reports stated stricken out.)

In my investigations I have not found any engineering situation that can be described as first class, absolutely safe and sound, in any part of the building. There probably are. It would be remarkable if there were not, but I have not found and. Assuming that the building is, from an engineering
595 standpoint, in fact, unsafe at the present time because of the character of the foundations and because of the overstressing which Mr. Parker testified about, or for either of those reasons, I would say it was in the same sense unsafe from the time half of the present settlement had taken place. On the same assumption the first ten years of the life of the building, when the settlement was occurring, would not necessarily be the most dangerous. I will tell you why. You start pushing your fist through that window glass and you push it for a certain length of time until the glass bends, and then you push it through. Is the most dangerous time for that glass

when it is bending or when you push it through? This thing is going to break some time if you keep loading it long enough, and the most dangerous time is just before it breaks. Now, it has not broken so far, so it was not in the first ten years. The most dangerous time is yet to come, and it may come tomorrow morning, if you keep on loading it. I did not say this building may fall down tomorrow morning. It may be a trivial item of construction. I am not saying as to that, and no man can say as to that. But if you keep loading this long enough on materials that you know are particularly unadapted to this kind of strain, there will come a time when something or other will break. The most dangerous time is just about 1/42 of an inch before it breaks.

On the supposition that there is overstressing on the columns, and the girders are loaded too heavily, and suppose the foundations or the soil or the land is such that the building settles unevenly for ten years; and then it becomes more or less stable and the unevenness of the settlement grad-
597 ually disappears, I can't see that the greatest strain on those overloaded places comes when your building is settling unevenly during the first ten years. You look upon overstressing as a fact in itself. To me it is only a symptom. If you take a piece of steel capable of holding 35,0000 pounds to a square inch below the elastic limit, that is, below where it would bend, and you allow an allowable load on it of 16,000 pounds a square inch, the principal significance of overstressing beyond 16,000 pounds and below 35,000 pounds, as I see it, is the significant fact that you are approaching that elastic limit. It is only because you are approaching it that overloading has any particular significance, and the danger does not occur until you get to that point. The fact that you are on your way is not dangerous except as it indicates you are wrong somewhere, you are taking a chance, but the large danger does not come until you arrive. The particular significance of overloading, from my point of view, is that you are approaching the danger point, the elastic limit, whichever you choose to put it on the picture, but the first danger is when you enter the zone of danger. You know you are on the wrong way. You had better back up. If you ignore that warning, you don't increase your danger particularly by going half way, but when you arrive, that is the danger point; just before you arrive. I can't say whether we are going to arrive tomorrow morning or fifty years from now because it is a matter of torsion strain and no man can figure them,

and no man can tell their direction. It may be in some particular item of construction; it may be some firm anchorage is holding that load. That firm anchorage may let go
598 tomorrow. If it lets go, that load may take hold of some weaker member that is not able to hold it, and you may have a fracture in a minute.

I understand the Auditorium Theatre is open right along. It must have to get a permit from the city every year to run. There are regular city inspections there. I presume the elevators are inspected by the city. You couldn't operate them without that. These elevators have been there, so far as I know, since the start of the building. These have lived 35 years. I wouldn't say that is about the life of an ordinary elevator. How long does a piece of machinery last? Last year I saw a Corliss engines in a diamond factory in Belgium that was turned out in 1842, and it was the best piece of mechanism in the city. I wouldn't want to say how long it would last. I couldn't say how old the plumbing it. I know some of it has been replaced. I know I have put in new plumbing on the rooms that face on Michigan avenue. That much I know was bad back ten years or more ago. The rest of it I can't tell you.

I have had to shore up a building located on the opposite side of a street from where excavations for caissons for a new building were going on. It is an ordinary incident in our practice; adjoining new buildings. I don't recall any on the other side of the street.

What I meant by my statement that engineering had not advanced at the time this building was built was that the problem of doing the engineering for the modern steel skeleton building of great height had not started; that building engineering up to that time had come along a road of cast iron columns, and wooden columns which later developed
599 into metal joists and girders, and the engineers who carried on that work were rule-of-thumb men who were particularly familiar with this particular type of structural work; with columns made of wood or cast iron and of girders or joists made out of wood or metal; and that the bridge engineering profession, which had run a line of development among similar problems but along different lines, in other words, railroad structural engineering, had not at that time been considered as part of the building problem. But right after the termination of the auditorium problem, say the early nineties, produced such buildings as the Old Colony Building,

the Monadnock Building, the Venetian Building, the bridge engineering methods, were called into the building problem. The explanation of the deficiencies in this Auditorium structure, in my mind, lies in the fact that what we know as real building engineers did not do it. What we know as modern structural engineers did not do it. That is my theory. No structural engineer would produce a bracket such as I showed you yesterday on that column. It would not be possible. I am judging this from symptoms of that kind, in my review of the structure in this building.

When I said "column" I meant that column with the wing on. I never saw anything like that, but I presume they are wings. The bracket is the wing at the top.

When I mentioned a settlement of 28 inches, I referred to the total settlement and not to the difference in settlement.

I have been a director of the Chicago Auditorium Association seven or eight years, and a stockholder about the same time. I expect to be the architect for the new building 599½ that is to be put up if we win this lawsuit, is that right?

I think I hold approximately 500 shares of stock.

Caissons have been put through quicksand.

I don't know whether the Auditorium Association has ever notified the city authorities about the structural defects of the Auditorium building, but I don't think so. If they had notified the City Hall of those deficiencies, we would have been put out of business in my judgment. That is the reason why, if I had anything to do with it, we would not have notified them. I cannot state of my own knowledge whether the Auditorium Association has ever given notice of any kind with reference to the structural defects to the owners of the various fees covered by the leases on which the Auditorium Building stands. I wouldn't know that. I am familiar with the provisions of the present building code of the City of Chicago. It was intended to be applicable entirely to building construction after that ordinance took effect. I don't know that there are certain provisions in the code which are expressly applicable to existing buildings. They handle that, in my experience, by departmental rulings and special ordinances. There is a rule that it is not applicable to buildings that are up, except by rulings of the department and special ordinances, in my experience. The building code divides buildings into various characters, and has separate provisions with regard to each class. I don't recall in which type a building of the character of the Auditorium Building falls.

I think class 5 applies to the theatre end. The other end I can't tell you.

600 The highest and best use of the Auditorium as I defined it, the best commercial use, would be the same irrespective of the amount of taxes upon the property. As to 1887, I would say that a solution entirely satisfactory to the interested parties in 1888 was a much less efficient solution than would satisfy the same parties in 1924. I have noticed in buildings as we go along from year to year that the pressure becomes higher all the time for a more efficient solution, larger income, more conservative distribution of space, less liberal distribution of space with respect to things you would like to do but cannot do. That applies to all buildings. We don't arrive at the same efficiency of space in our Chicago Building that you do in New York. You have banks in New York that do double the volume of business in the same space that we do here in Chicago, not because you want to but because you have to. I do not think the highest and most efficient solution of the problem would have been the same in 1888 as it is now. Theoretically it would be the same at any time, irrespective of taxes or fixed charges, but I never saw a man run as fast to win a race against a slow poke as against a fast man. It isn't human nature. I wouldn't say my professional advice on the highest and best use to which that property could be put would be governed by any such consideration as that, but I am not so sure that it wouldn't

601 just the same.

When I was asked by Mr. Clinch to draw up plans for a possible new building upon the site, he asked me to study his problem and suggest to the board of directors what I thought was the thing for them to do. They were willing to listen to anybody's suggestion as to what they should do at this moment. Later on they will undoubtedly take up the consideration of details. In the last three or four years Michigan avenue has become wonderfully in demand for commercial occupancy. What was lounge rooms in the Congress hotel, across the street, have now become shops the whole length of Michigan avenue. I have had some advice that shops on the Auditorium site for an entire building would be a better case of judgment than to try either a hotel or office building on account of that kind of occupancy already having developed to a high degree of efficiency on State street and extending to Michigan avenue. That is a question of the best judgment of the board. That would be an alterna-

tive solution. The ideal solution at this time would be to leave it so elastic that with the change of demand you could change instead of being tied down to your decision of today. One of the great drawbacks to the present occupancy of the Auditorium is that the space is so constricted. The lay-out of the space does not give you any elasticity to amount to anything so as to allow you to change your occupancy. Of these two plans which are in evidence, I would not say
602 those two plans are radically different in design. The second, I think, could be developed from the first if you changed your mind before you completely developed your auditorium. One plan has half of its space devoted to a theatre and the other had the whole space devoted to a hotel. The four other plans I drew up tentatively were traveling along from the same starting point on divergent roads. The plan of a modern building is remarkably alike. If you speak of a steel structure and enclosed walls, you can take the same space and make it a bank by slightly changing the height of the ceilings, etc.; you can make it a hotel by lowering the ceilings, or you can make it an office building. In that sense they are the same, but in the sense of a completed structure, totally different. They are totally different plans in the sense of ultimate results. All these proposed plans are totally different from the present Auditorium Building. Not the slightest resemblance. If I ever read in paragraph 20 of the original bill of complaint the description of a proposed new building I have forgotten it. (After looking at portion of bill indicated by counsel.) Yes, that is substantially right. That description refers to both of the plans and all of them. Any plan that has been submitted will comply with that description. In other words, these two plans which are in evidence both contemplate an allocation of about 10 per cent in value of the proposed improvement upon the so-called Peck leasehold. That is correct. One of the two plans con-
603 templates that the west half of the property on which the present building stands shall be devoted to a theatre. According to that design the theatre would cover the entire Peck leasehold. I think that under the arrangement suggested more than one million dollars would be on the Peck property. When I said that 10 per cent of the value of the total structure would be on the Peck property I was figuring on the basis of the cost to erect. The other design which calls for a hotel building, I believe, covering the entire leasehold

interests here, would increase the quantity that is on the Peck leasehold. Probably in that event it would be double, two million dollars in value, or more. I would say roughly 20 per cent. In the other four designs I do not remember definitely how that was allocated to the Peck household, but none of them were less than the allocation in the first one we talked about. I would say none were less than 10 and none were more than 20; that is a fair approximation.

The hotel project showed certain courts, some between the second and fourth floors, I would say. There is a floor plan of the proposed theatre and hotel combination. They are drawn to scale.

At the time the Auditorium was constructed there were not a great many large buildings of those dimensions in Chicago. It is a hard question, but I should say the first building comparable in size and importance to the Auditorium to be torn down in the city of Chicago was the old Honore
604 Building at Dearborn and Adams. That occupied a quarter block instead of a half block which the Auditorium occupies, but it was an office building entirely. It was torn down about 1895, I should say, and was perfectly sound. So far as I know, there was no criticism of it on the basis of defective engineering or defective structure, but it was simply obsolete. It was an old type office building, built before the days of the elevators, and it was not combined with stores and could not hold up its end. It was built right after the Civil War, perhaps 1870, I would say. Sometime after the fire, anyway. I think it was quite as important in Chicago when it was built as the Auditorium was when it was built. When the Auditorium was built, of course, it was a much more important building than this Honore block. I would say the Honore Building was more important when it was built in relation to the development of the city, and quite as important when it was torn down, as the Auditorium was and is now. That is the first I recollect. There is the Champlain Building, built in the nineties, torn down so long ago I suppose none of us remember the date. At the time the Auditorium was constructed, so far as I know, no such building had been torn down.

The amount of settlement of various buildings with floating foundations varies in the city of Chicago within narrow limits; nothing approaching this Auditorium settlement has ever come to my notice. By narrow limits I mean under a

foot. That would be the limit in the amount of settlement
605 that would be normal in buildings in Chicago. I would say when the building didn't settle beyond this limit I am talking about, assuming everything else to be sound, it doesn't necessarily mean the structure is inadequately designed.

Redirect Examination.

The Continental & Commercial Bank Building is on LaSalle street, between Adams street and Jackson boulevard. I don't recall the character of buildings that were torn down when that building was constructed, but they were substantial, comparatively modern buildings, some of them at least, occupying one of our most important streets, and were serviceable for the business of that day. Those buildings were quite comparable in magnitude and importance to the Auditorium Building, and built after the Auditorium. They were modern steel structures, not obsolete. They were the same type of construction we use today, practically speaking.

I was a member of the engineers' corps that passed on the subway plans, a board appointed by the sub-committee of the city council, between a year and two years ago. I have kept in general touch with the plans that are under discussion in this city for a subway. The discussion of a subway on Michigan avenue east of the Auditorium was the subject matter of
606 investigation by that committee that I was on. So far as I know, that has always been a subject of consideration in all subway investigations.

There would be a difference in the effect of the withdrawal of water upon piles in the foundation of a building where the piles are a continuous structure horizontally with the grain of the wood, doing down well below the water level, and the effect of the withdrawal of water upon horizontal beams of the character used in the Chicago Auditorium. I would say that the piles would carry moisture through the length of the stick by capillarity. That would tend to protect the timber above the point that would be protected if confined to the horizontal fibre entirely outside of the water line.

In connection with my investigations I had occassion to consider what effect the partial and internal reconstruction of the Auditorium Building included in my preliminary plans and sketches would have upon the financial investment necessary to carry out such partial rehabilitation. I came to the conclusion that the increase in revenue obtained by such re-

construction was entirely inadequate for the capital expenditure involved in those changes. I made up my mind that the probable increases in revenue which might result from such a partial rehabilitation would not meet the carrying charges on the investment necessary to bring about the partial rehabilitation.

607 In the discussions I had with the city officials in which I induced them to postpone various requirements on account of the uncertainty about what would be done with the building following this litigation, I did not discuss any suggestions made by them growing out of their annual inspection of the theatre. My effort was to keep them off the subject by the broad statement that shortly a complete rehabilitation or replacement would occur where we would make everything to their satisfaction in accordance with the law. That applied to all questions about the theatre.

Recross Examination.

I should say the Continental & Commercial Bank Building was erected and other buildings torn down to make way for it about ten years ago. I have forgotten the exact year.

In the recent ordinance involving the building of a subway which was featured at the recent election, I don't recall the physical subways that were voted on. I do not believe that was put up. I am certain that scheme discussed in detail the financing elements of the subway question, but whether it located physically certain subways I don't know. Maybe

608 it did. So far as I know it did not locate those subways on Michigan avenue or Wabash avenue. You already have a subway there.

I did make some computation as to the possible net earning capacity of a rehabilitated building. I don't know whether or not the Chicago Auditorium Association within the last five years has put out any prospectus or other form of offer by which they have suggested to possible prospective purchasers that the Auditorium could be rehabilitated to earn an income. I don't know that any such suggestions were made. I do not recall ever hearing of a prospectus being placed in the hands of the Chapin interests. I think I should recall if it had happened. I never saw any such document that I know of. (document handed to witness.) I do not think I ever saw that before, or anything like it. I do not know anything about it at all.

In preparing the various plans of a proposed new building I prepared them all for the fullest development of the present plot as a whole, irrespective of any subdivisions into leasehold interests. I did have in mind the subdivision into these five separate leaseholds. I prepared the plans just as if it has been one single piece but with the other element in mind. Most of the downtown developments are made up of a group of subdividing leases. Many of those leases have provisions where columns have to be placed on the property lines strong enough to put brick walls between the property lines. In other places that is carried to the ultimate result, some-
609 times you have to provide so that separate boiler plants can be put in, separate elevators or separate smokestacks. In this case I provided that our columns, girders and things of that kind could be adjusted to the lot lines if necessary, so that we could shuffle our elevators and other requirements to meet what would be the interpretation of the leases if there should be such a thing. You can't subdivide a theatre building so that it can function irrespective of the other component parts of the theatre building, but on the line that separates the theatre from the hotel development, we could provide a line of structural steel that would let that particular separation be made; as so far as such structural members are vertical and horizontal and would form a position, it could be done with respect to the other line, but you can't hand a man half a theatre and make him happy over it. That arrangement is physically impossible. I didn't get up to the point of having to meet that though. About the best use you can make of a piece of a building, is for negotiation purposes with the partners you would like to have with you to make your proposition a success. My idea is when you have a piece of property it is only an element that is going to enter into a large development. The best you can have in that property is to have an important and essential item of the building located on that property, and to have the tributary elements arranged so that they can't get along without you. I do not see how a corner piece of property 80 by 150 could be used as a unit in itself. That is all he has now, all he has ever had. All the owners of this property have always had a piece of a
610 building. You are speaking of the Peck estate. The Peck estate now have a piece of a second rate office building that is no essential part of the development in either direction. North of it are the elevators and stage, faced by a partition at that place. They could run that without him.

He is the tail end on Congress street, they could partition him off. He is on an island at sea. I would say between the two he is better off now than before. I am making my statement in view of my knowledge of Mr. Peck's situation in this matter. He has discussed it with me. He only held dominion in this property by virtue of his associates in the ownership thereof. He could not go beyond his own personal rights in the matter which he contracted for with his other partners in this matter, for the creation of a unit development. His unit development consisted of a tail of two definite forms of development, a piece of a hotel building of which he was not an essential part, and a piece of an office building in which he was the last item of importance, and in one corner the fire wall of a theatre he didn't need at all. I would say in either one of these proposed plans he is going good, he is in a better position in reference to either one of them. I did not say that in my proposed plans I am giving Mr. Peck's representatives the advantage over the other fees, but over what he had before. The other lessees have not suffered but he has bettered his position. It is true that all my proposed plans
contemplated different arrangements for the various
611 leasehold interests, different kinds of inter-related easements of support, and so forth. They are possibilities that have not been developed, but there are possibilities to develop those inter-related interests, to separate them more or less to the advantage of the various parties, without spoiling the efficiency of the end result in the building. They are not radically different from the present cross easements of support; same scheme of procedure as before, differing in development, but practically speaking they are the same.

612 R. FLOYD CLINCH, recalled on behalf of plaintiff, testified as follows:

Direct Examination.

In my conversations with the owners or representatives of the owners of the various pieces of land involved in the Auditorium site, I discussed the question of the defects of the present building. The first conversation was with Mr. Follansbee on my trip to Washington. I gave him as the reason why we should do something, and very quickly, the fact that the present building could not stay up very much longer, that

it was getting very dangerous, and that was one of the reasons we wanted to hasten these conclusions. I also talked to Mr. Ambrose Cramer, and I think in my last interview with Mr. Willing and Mr. Cramer the same reasons were given to both of them as I gave to Mr. Follansbee. I also talked to the Chapin estate and told them we were getting very close to a time when something had to be done, as the building was getting in a dangerous condition. In that conversation the fact that the building was defective was discussed. I told him the building showing cracks, that we had had our architects keep track of them very carefully and that we had an opinion from them we ought to do something very quickly to reconstruct a new building there. In the conversation
in Mr. Boyden's office when Mr. Malone and other gen-
613 tlemen were present, to which I have referred, that subject was mentioned. Those are the conversations about which I testified the other day, in which these parties and the representatives said they would oppose the tearing down of the building, except as relates to the Chapin estate. I can't recall any other specific dates on which this subject was mentioned, but the whole subject of reconstructing a new building which has been under consideration for some time, and of which I had at different periods talked to Mr. Follansbee and Mr. Cramer, the same conditions were mentioned in a general way, that the construction of the building was a necessity.

Under the two leases from the Studebaker Brothers Manufacturing Company there is a provision for a re-appraisement, and there was such a re-appraisement in 1916. The appraisers fixed the value of lot 18 at $286,937.61, and the value of lot 19 at $279,729.06, making a total valuation of the two lots of $566,666.67. This appraisal established the rent under the two leases for the ten-year period of 1916 to 1926, at $34,000 a year. That is the basis on which the rent under the two leases has been paid during the period and is still being paid.

The Auditorium building was erected by the corporation now known as the Chicago Auditorium Association, the complainant in this suit. They employed contractors to do it,
but they were responsible for the building. The cost of
614 that building was paid through the proceeds of the sale of stock and bonds. That is the present outstanding stock and bonds of the Association. Some of those bonds, as I testified before have been retired.

Cross-Examination.

In my testimony the other day I gave the dates exactly of the conversations I had with the representatives of the Peck estate, Mr. Malone and Mr. Tuckerman. That was May 7, 1922, I think.

I cannot fix exactly the date of the earliest conversation at which I discussed with Mr. Cramer of Mr. Willing the question of the dangerous condition of the Auditorium Building. The more definite date was the time that I met them, as I testified, which was in probably June or July of 1922. The other conversations I had with Mr. Cramer was earlier; at least a year, I should say. The occasion of that discussion was the fact that we wanted to get together as to what should be done with that property. Mr. Willing was not present at that time.

I did not go into the details of the nature of these so-called defects when I talked to Mr. Willing and Mr. Cramer, or when I talked to Mr. Cramer. It was in a general sort of way, but a very positive sort of way. It may have been in these conversations that I took up the matter of putting in stores
615 on the Michigan avenue front, because at one time in my conversation with Mr. Cramer he volunteered to me that if any improvements that we might make on that property required more capital, the terms of the will under which they were trustees were so broad they could elect to join us in the undertaking, and I think he and I did discuss what could be done in the way of stores, what improvement could be put in to put the property on a paying basis. I don't know whether the store idea was his or mine, but anyway we concurred in it.

616 FREDERICK C. LUNDGREN, a witness on behalf of the Plaintiff, testified as follows:

Direct Examination.

I live in Chicago and am employed in the office of Fisher, Boyden, Kales & Bell. I made a tabulation of the taxes upon the Chicago Auditorium property beginning with the year 1888 and running to the year 1923, inclusive. I have the tax receipts from which that tabulation was made. The statement handed me shows the taxes paid on the property from

the year 1888 to the year 1924. These figures were all taken from original tax receipts which I had in my possession at the time of making the table. The taxes paid in the years 1915 and 1916 were left blank for the reason that at that time the exact amounts paid to the county treasurer were not shown by the tax receipts. They were receipts on account, but there were no receipts in full. I left those out to avoid complications. I subsequently made a more complete tabulation showing the taxes paid for the entire period, including those years to which I have just referred, and the valuations of the land and buildings on which the taxes were based. The information as to taxes which was not available from the tax receipts in my possession I got from the books of the Chicago Auditorium Association. The document which I now
617 have in my hand corresponds with the document first shown me with the exception of the year 1901. Where this table shows taxes paid $41,801.09, the receipt which I was able to find showed $36,348.78, but I informed myself from the books of the Chicago Auditorium Association, that taxes to the amount of $41,801.09 were paid that year. Those are just the general taxes, not including special assessments.

(The second of the two documents shown to the witness was offered and received in evidence as Plaintiffs' Exhibit 78, and is as follows:)

618

Plaintiff's Exhibit

Year	Board of Assessors	Board of Review	Separate Value of Building	Taxes Paid
1888	$ 55,800	67,964		3,555.90
1889	85,000	102,850		5,517.92
1890	308,000	363,440		22,707.78
1891	293,400	293,400		23,139.62
1892	305,500	375,765		26,074.38
1893	305,500	360,490		24,480.90
1894	305,500	360,490		25,000.00
1895	310,770	363,601		32,735.04
1896	290,770	348,924		29,114.25
1897	310,000	375,100		33,466.43
1898	280,000	355,600		31,452.82
1899	3,778,000	3,278,800		28,000.00
1900	3,778,000	2,622,400		46,396.90
1901	3,778,000	4,344,700		41,801.09
1902	3,778,000	2,900,000		30,148.40
1903	4,194,880	3,214,400		37,627.79
1904	4,194,880	3,214,400		41,086.50
1905	3,214,400	3,214,400		43,690.15
1906	3,214,400	3,214,400		42,282.24
1907	6,068,740	3,854,295	1,600,000	55,501.88
1908	3,854,295	3,254,295	1,000,000	48,944.63
1909	3,254,295	3,254,295	1,000,000	48,489.02
1910	3,254,295	3,004,296	750,000	46,466.47
1911	5,007,993	3,560,664	750,000	59,819.18
1912	3,560,664	3,560,664	750,000	52,223.13
1913	3,460,664	3,460,664	650,000	61,369.14
1914	3,460,664	3,460,664	650,000	58,023.81
1915	5,003,955	3,723,429	650,000	61,064.29
1916	3,723,429	3,573,432	500,000	72,659.84
1917	3,573,432	3,573,432	500,000	73,255.43
1918	3,573,432	3,573,432	500,000	69,682.00
1919	3,954,244	3,628,968	100,000	93,264.54
1920	3,754,244	3,754,244	100,000	101,176.96
1921	3,754,244	3,754,244	100,000	138,531.67
1922	3,754,244	3,754,244	100,000	145,289.30
1923	3,754,244	3,754,244	100,000	148,480.40

619 The witness: That document contains the full valuation placed upon the property by the Board of Assessors and Board of Review. Another column shows the separate value of the building. These figures were taken from the records in the county clerk's office. The books from 1888 to 1898 showed the full value placed on this property by the Board of Assessors. At that time there was no Board of Review, so the figures appearing in the column entitled "Board of Review" are all valuations of the Board of Assessors as revised by the State Board of Equilization. In 1898 the law was changed so that the assessors were required to value property every fourth year, and also an assessed value was established which was to be one-fifth of the whole value. The books from 1899 on, show both the full value of the property and also the

assessed value. At the same time, in 1898, the Board of Review was established, and the books of the Board of Review show not the full value of the property but the assessed value. The figures which I have placed in this column are computed by multiplying the assessed value as shown on the books of the Board of Review by the proper figure, which, from 1899 to 1909, was 5.

In 1909 the law was changed, giving an assessed value of one-third. This continued to the year 1919, when the law was again changed, establishing an assessed value of one-half.

The figures in the Board of Review column are all com-
620 puted by using those proper figures for computation. Up to the year 1907 the books showed only the full value of the lot and building taken together. In 1907 a departure was made and the books of the Board of Assessors shows the full value of the lot, full value of the building, full value of the lot and building, and assessed value of the lot and building. The books of the Board of Review show the assessed value of the lot, assessed value of the building, total assessed value; again the total value of the lot and building not being on the book but being computed from the total assessed value as appearing in their books.

In 1912 still a further departure in the way of keeping the records was made, and for taxation purposes the property was divided into two parcels, which we have for convenience referred to as Parcel A and Parcel B. Parcel A consists of the Peck and Studebaker properties, and Parcel B of the Walker properties. In each case the books of the Board of Assessors would show as before the full value of the lot, full value of the building, full value of the lot and building, and total assessed value. The figures in the table here are arrived at by adding together in each proper column the figures appearing for Parcel A and the figures appearing for Parcel B. The books of the Board of Review are similar, showing as to Parcel A the assessed value of the lot, assessed value of the building, and total assessed value; and likewise with Parcel

B. The figures in the Board of Review column were ar-
621 rived at by adding together the figures for the two parcels and multiplying by the proper figure to obtain from the assessed value the full value.

The figures given in the column marked "Separate Value of Building from April 1st, 1907 on", are taken from the figures given in the books of the Board of Review, which in each

case would be the assessed value rather than the computed full value which I have placed in the table.

In this Exhibit the figures in the column marked "Board of Assessors" shows the full value of the land and building, the Board of Review the same, full value of the land and building, the fourth column being the value of the building alone. To bring that exhibit down to and including the taxes of 1924 there should be added to the column marked "Taxes Paid" the sum of the two receipts, the first receipt being for the taxes on Parcel A, amounting to $49,648.39, and the other receipt for taxes on Parcel B, for $108,029.93, being a total of $157,678.32.

622 Plaintiff thereupon rested its case.

Mr. Cooper, on behalf of The Northern Trust Company, Trustee, and other defendants, for the purpose of completing the chain of title to the premises demised by the two Walker leases, offered certain documents which were received in evidence and marked as follows:

DEFENDANT WILLING'S EXHIBIT 2.

Deed from Ambrose Cramer and Mark Skinner Willing, as trustee under the last will and testament of Henry J. Willing, deceased, to Mark Skinner Willing, dated September 29, 1913, and recorded in the Recorder's Office of Cook County, Illinois, in book 12524, page 580, as document No. 5275680, conveying an undivided fractional interest as therein set forth in the premises demised by the Walker leases.

DEFENDANT WILLING'S EXHIBIT 3.

Deed from Ambrose Cramer and Mark Skinner Willing, Trustee, to Mark Skinner Willing, individually, dated December 28, 1923, and recorded in said Recorder's office as document No. 8454565, conveying property as therein described.

DEFENDANT WILLING'S EXHIBIT 4.

Certified copy of a decree entered June 7, 1924 in the Superior Court of Cook County, Illinois, in a cause therein pending as number 402516, wherein Mark Skinner Willing, as trus-

tee and individually, was complainant, and The Northern Trust Company and others were defendants, accepting the resignation of Ambrose Cramer as trustee under the last will and testament of Henry J. Willing, deceased, and appointing The Northern Trust Company as Trustee in his stead.

623 DEFENDANT WILLING'S EXHIBIT 5.

Deed from Sidney S. Pollack, master in chancery of the Superior Court of Cook County, Illinois, dated June 30, 1924, and recorded in book 19831, page 382, as document No. 8494479, conveying to The Northern Trust Company, as Trustee, pursuant to the decree, Defendant Willing's Exhibit 4, the interest of Ambrose Cramer, trustee, as in said decree provided.

624 EDWARD J. FREIBERG a witness on behalf of the defendants, testified as follows:

I have lived in Chicago fifty years, and have been engaged in the business or profession of commercial photographer thirty-five years. My firm is Hornby & Freiberg, 6 East Lake Street. In April, 1925, I took a number of pictures near the Chicago Auditorium Building, at the request of the attorneys representing certain defendants in this cause. I took the photographs now handed me. The first one marked with a pencil notation, "6" in the upper left hand corner is a photograph of the Auditorium Hotel, facing the east front. My camera when I took that picture was about 25 feet from the Illinois Central line of property. It is a faithful reproduction of the front of the building.

(Said photograph was offered and received in evidence as Defendant Willing's Exhibit 6 and is certified herewith as a part of the record.)

I took the picture marked in pencil with the figure 7 in the upper left hand corner. My camera was a little to the south, showing the south line of the south front. It also shows along the left hand side of the picture the Congress street front of the building. The flag pole is in Grant Park across the street. That is a faithful reproduction of the portion of the building purported to be shown.

(Said photograph was offered and received in evidence as Defendant Willing's Exhibit 7 and is certified herewith as a part of the record.)

It was agreed that any photographs received in evidence were received on behalf of any defendants wishing to avail themselves thereof.

I took the photograph marked 8 in pencil. My camera was south of the Congress street frontage and was pointed
625 northwest. The photograph faithfully reproduces a small portion of the Michigan avenue front and practically all of the Congress street front of the building and the tower.

(Said photograph was offered and received in evidence as Defendants' Exhibit 8 and is certified herewith as a part of the record.)

I took the next photograph, which bears a pencil notation "9". I was in the building at the northwest corner of Congress and Wabash avenue. The camera was pointing northeast, taking in nearly all of the west frontage of the Auditorium Building and as far as Van Buren street. I was in the third floor window at the northwest corner building. That is a faithful reproduction of the portion of the Auditorium which is shown. The long sloping roof at the lower part of the picture, towards the right, is the Congress street station of the elevated railroad and platform.

(Said photograph was offered and received in evidence as Defendants' Exhibit 9 and is certified herewith as a part of the record.)

I took this next picture. The camera was standing at the east line of the elevated structure on Wabash avenue, at the corner of Van Buren street looking southeast, showing a little of the north frontage of the southeast corner building and all of the frontage of the block to Congress street, including the Auditorium. The building that appears on the background as higher than the others is part of the Auditorium tower. The shadowgraph effect to the right is the elevated structure. The picture is a faithful reproduction of the portion of the street which it purports to represent.

(Said photograph was offered and received in evidence as Defendants' Exhibit 10 and is certified herewith as a part of the record.)

626 I took this last photograph. I am standing in Grant Park, about 25 to 30 feet from the Illinois Central propertyline, looking west from Grant Park, showing the block between Van Buren street and Congress. The Auditorium is

that large building to the left of the photograph. The building in the center is the Studebaker building, and to the north it is a Chicago Club. That is a faithful reproduction of the buildings in that block. This apparent construction work is in Grant Park on the opposite side of Michigan avenue.

(Said photograph was offered and received in evidence as Defendants' Exhibit 11 and is certified herewith as a part of the record.)

627 BRUCE B. BORT, a witness on behalf of the defendants, testified as follows:

I live in Chicago and am an Illinois registered land surveyor. I have been engaged in that profession for the last twenty years, with the Chicago Guaranty Survey Company. In the year 1925, at the request of the attorneys representing certain defendants in this cause, I prepared the map or plat now handed me. My instructions in the preparation of it were to prepare a map to scale of that portion of the central portion of the city of Chicago bounded on the north and west by Wells Street on the east by Michigan avenue, and on the south by Roosevelt Road. This map is a full, true and correct compliance with the instructions I then received. It shows the streets by name, and the blocks.

(Said document was offered and received in evidence as Defendants' Exhibit 12 and is certified herewith as a part of the record.)

628 HUGH N. SMITH, a witness on behalf of the defendants, testified as follows:

I live at 817 South Scoville Avenue, Oak Park. I am a certified public accountant, and have been for five years. My office is at 111 West Monroe Street. At the request of the attorneys representing certain defendants in this cause, I went during the last month or six weeks to the offices of the Chicago Auditorium Association, and made an examination of certain of its books and records. At that time I also had access to and made examination of certain reports of Arthur Young & Company. I compiled a tabulation of statements as they have been compiled by the audit reports of Arthur Young & Company from 1889 to 1924. I also compiled bal-

ance sheets of the business of the Chicago Auditorium Association, from the Arthur Young & Company reports, for the years 1901 to 1924. I refer to fiscal years. The document now produced is the report which I furnished. It reflects a true report as shown by the Arthur Young & Company reports.

(Said document was offered and received in evidence as Defendants' Exhibit 13 and is certified herewith as a part of the record.)

629 During the time I was working there I had access to and examined the audit reports of Arthur Young & Company, or its predecessor, including the year 1900 and covering a number of years prior to that time, from the period of inception.

Mr. Cooper, on behalf of defendants offered in evidence the document heretofore marked "Defendant Willing's Exhibit 1 for identification," which document, so offered, was received in evidence as Defendants' Exhibit 1.

630 LAWRENCE G. PARKER, a witness on behalf of the Plaintiff was recalled for further cross-examination, and testified as follows:

I am the same Mr. Parker who testified on behalf of the plaintiff a day or two ago in this case. Since that time I have assembled and brought here most of the information, all I could gather in the time I had, about the formulae which I applied in arriving at my conclusions.

The first beam to which I referred as typical beam in the office portion of the building, referred to as a 10-inch beam, my notes show that the beams run somewhat oversize as to depth, 10½ inches, and figuring with the unit stress of 16,000 per square foot, the resisting moment in foot pounds was 33,600. The actual load on the beam, the unit load, was 113 pounds per square foot: the space of the beam 5⅔ feet; span 19 feet; total load on the beam, 12,200 pounds; the bending moment, due to the load, 22,000 foot pounds. That is one of the beams I reported safe. It is not necessarily a complete designation of the beam to say it is a 10-inch beam. I have it noted 10½ inch, 25 pounds. It was somewhat irregular. I arrived at the figures by standard formulae. This particular work shown here on the beams, I did not measure myself personally. It was done under my supervision, but I did not measure the beams. I haven't the notes on the areas meas-

ured at that time. I was not able to find all the information. The figure of 113 pounds per square foot for the load is shown on one of the exhibits which was offered the other day. It is wood finish in the floors, one-inch finish; three pounds; 1¾ inch cinder concrete fill with nailing strips imbedded, 15 pounds; 12-inch tile arch, 35 pounds; ¾ inch
631 plaster, 5 pounds; the weight of the steel beams 5 pounds; total dead load, 63 pounds per square foot. These are all in terms of pounds per square foot. Live load, 50 pounds per square foot; total, 113 pounds per square foot. I haven't my notes on how the weight of the beam was figured, but I have confidence in the man who did this work, and assume he did it our usual way. He measured the depth of the beam and the width of the flange, and what other information that he considered necessary in addition to that, in order to determine the section, so as to tbe able to compute the moment of inertia of the section. I don't know of any beams rolled at the present time that are 10½ inches deep. I did not use a standard of weight of the present time and apply it to a beam that was rolled in 1886, of a size I had never seen before. No, as I have just previously stated, the weight would be determined from the measurements of the beam. You get the cross-section from the cross-section of the beam. A sectional area, multiplied by approximately 3.4 will give the weight per foot. The weight of a cubic foot of iron, divided by 144, gives 3.4. The weight, the 3.4 represents the weight of a bar of iron one inch square and 12 inches long. I will have to say again that I did not do this work personally, but I can only tell you what our usual method of doing it is. I did not make that particular computation. I know who did. I couldn't say positively how he figured it. The weight is all I have. I was unable to find his original notes. I have pretty good reason for believing that he actually measured it.

Here is a girder in the hotel portion of the building, near the tower, on the eighth floor of the Congress street side
632 of the building. It is probably the same one I testified was overstressed 7 per cent. I have 8 per cent in my notes here. Second panel east of the tower.

Here is a girder, the web plate 22 inches by ⅜ of an inch, 4 angles, 3 by 3½ by ½, and two cover plates 12 by ¾. The load consisted of a series of contemplated loads represented by the beams which framed into this girder. The weight of the girder was figured in as compensated at the load point of the beams. These loads were distributed approximately at 7.3

feet part. The span of the girder was 37.5 feet. The two loads nearer the center were each a total of 18,800, and the two nearer the outside ends, 17,680. The total load was 73,000 pounds. The bending moment, due to these loads, was 412,000 pounds. The resisting moment to the section 381,000 pounds. The overstress I figured at 8 per cent. This computation was made by a standard formula. On girders the live loads of 50 pounds were reduced by 15 per cent. That is a standard formula. I did not measure this girder myself. Probably one section was measured away from the ends, not at the ends.

Supporting the banquet hall floor, I have the 24-inch, 100-pound beam. These were spaced 13⅓ feet apart; span 41 feet. The banquet hall floor loading was taken 126 pounds per square foot. The beam was uncovered. The weight of the beam was taken 100 pounds per lineal foot. The actual bending moment, due to the load in this beam, was figured at 321,000 foot pounds. The resisting moment of this beam was taken the same as standard, 2400, as found in the present hand books, and it was 264,500 foot pounds. That over-633 stress was shown there on the basis of steel beam, 26 per cent. Those beams were exposed, so there was not any question about being able to measure them at any place along the length of the beams that appear under the banquet hall. I did not measure any of the beams myself. I figured the live load at 85 pounds per square foot. I got these figures by the same process as I get them for the standard computation. I have the figures on the column 42-A based on the live load of 25 pounds for the roof, 25 pounds per square foot, and the dead loads of the roof 90 pounds per square foot, plus the weight of the beams, 95 pounds per square foot. The tributary area, 191 square feet; and the total load from the roof, 41,800 pounds. The tenth floor loads, based upon the weight of the dead load construction that I gave for the beams plus different partitions there might have been there, which added a small item in that particular case; 85 per cent of the 50 pounds per square foot live load. That is a 42½ pounds per square foot on the tenth floor. Now, those same loads are represented on the ninth, eighth, seventh, sixth, fifth and fourth floors, with the exception that the live load is reduced by 5 per cent, beginning with an 85 per cent reduction from the 50 at the tenth floor. At the ninth floor it would be 80 per cent of the 50 pounds, or 40 pounds; at the eighth floor it would be 75 per cent of the 50 pounds, or 37½ pounds per

square foot. In that manner the live load is reduced as the successive lower floors were figured. I don't know how much detail you want of this loading.

That tributary area included any portion of the stairway that was tributary to the column, and also the wall.

634 Those figures again comply with the standards I have been following all the way through. That is the Chicago code.

When I was going over this building, I did not see the name of the manufacturer of any of the metal work upon it. In figuring this tributary area on column 42-A, I am not able to tell from my notes whether there was anything more than what is ordinarily assumed tributary. If there were any additional columns in that wall, they are shown on the drawings. We probably determined the tributary areas with reference to the drawings, as well as actual measurements of the building. I think we had a drawing on that.

635 The deposition of EDWARD A. RENWICK, a witness on behalf of the defendants, was read in evidence as follows:

Deposition of Edward A. Renwick, 1125 Judson Avenue, Evanston, Illinois, architect.

I am an architect and have lived in Chicago and Evanston since May, 1882. I was employed at the office, from October, 1882, to 1886, with the firm of Holabird & Roche. In 1896 I became a member of the firm of Holabird & Roche, architects. In 1885 I became superintendent of the drafting room and wrote the specifications; general superintendent in 1886 to about 1900; I am business manager of the office; I have charge of the estimates and the carrying out of the drawings and specifications, through contracts and erection of the buildings. At the present time I am general manager of the office of Holabird & Roche.

The first important building of any consequence that I had any connection with in the City of Chicago was the Tacoma Building, northeast corner of Madison and La Salle Streets, Chicago. It is a fireproof building, cast iron columns, iron beams, and spread or floating foundations; thirteen stories high. Other building or buildings in the so-called loop or business district of Chicago with which I have had experience in building are the South half of the Monadnock, the

Old Colony, the Pontiac, the Caxton, the Atwood Building, the Cable, Powers, University Club, Monroe Building, Old Tribune Building, the Marquette, Otis, Roanoke, McCormick, North American Building, Century Building, Republic,
636 Rothschild & Company, Mandel Brothers, Boston Store, City and County Buildings, LaSalle, Sherman, Congress and Ft. Dearborn Hotels, Palmer House,—and others. The Atwood Building is at the northwest corner of Madison and Clark. That is a twelve-story building and is fireproof, with steel columns, girders and beams, masonry exterior, brick exterior. The foundations are floating foundations. The Old Colony Building is a sixteen-story building, located at the southeast corner of Van Buren and Dearborn, and has floating foundations with the exception of the south row of columns, which, some years after it was erected, were put upon caissons. The Roanoke Building, southeast corner of Madison and LaSalle, is twenty-one stories high, on caisson foundations. The McCormick Building is twenty-one stories high, located at the northwest corner of Michigan and Van Buren, on caisson foundations. The City Hall and County building is in the block surrounded by Clark, LaSalle, Randolph and Washington. It is twelve stories high, on caisson foundations. The Pontiac Building is at the northwest corner of Harrison and Dearborn, twelve stories high, on floating foundations. The Caxton building is about 100 feet north of the Pontiac on Dearborn. It is a twelve story building on floating foundations. The Cable building is at the southeast corner of Wabash and Jackson, and is a twelve story building on floating foundations. On pile foundations, I believe that is. The University Club is at the northwest corner of Monroe and Michigan, on caisson foundations, includ-
637 ing some of the playing courts, it is thirteen stories high. The Powers building is at the northeast corner of Wabash and Monroe. That is a twelve story building. It is on pile foundations. The Monroe building is at the southwest corner of Michigan and Monroe. It is a fifteen story building on caisson foundations. The Marquette Building is at the northwest corner of Dearborn and Adams. It is a sixteen story building on floating foundations. It was put up in 1894. The Otis building is at the southwest corner of LaSalle and Madison. It is a sixteen story building on caisson foundations. The North American building is at the northwest corner of State and Monroe Streets. It is a nineteen story building on caisson foundations. The Century building is

at the southwest corner of State and Adams. It is a twenty story building on caisson foundations. Rothschild & Company is on the northeast corner of Van Buren and State, a ten story building on caisson foundations. Mandel Brothers building is at the northeast corner of State and Madison, a fifteen story building on caisson foundations. Part of the Mandel building is at the northwest corner of Wabash and Madison, and is now twelve stories high and has part caisson and part pile foundations. The Boston Store is between State and Dearborn on the north side of Madison, a seventeen story building on caisson foundations. The portion of the Congress Hotel that we built begins about 100 feet south of Congress Street on Michigan Avenue and extends to about 80 feet of Harrison Street. It is twelve stories high on
638 caisson foundations. The Hotel LaSalle is at the northwest corner of LaSalle and Madison, twenty-one stories high, with caisson foundations. The Hotel Sherman is at the northwest corner of Randolph and Clark, is twenty-one stories high, with caisson foundations. The Fort Dearborn Hotel is at the southeast corner of LaSalle and Van Buren, is twenty stories high, with caisson foundations. The Morrison Hotel is forty-four stories high and is located on Clark Street about 150 feet south of Madison, east side of the street, with caisson foundations, is now under construction. The Palmer House is at the southeast corner of State and Monroe, extending through to Wabash, is twenty-five stories, on caisson foundations. It is now under construction. With the exception of these buildings which I have told you are now under construction, all the other buildings you have mentioned are still standing and in use.

I am familiar with the building known as the Chicago Auditorium Building, situated at the corner of Congress and Michigan, and extending through to Wabash Avenue, in Chicago. My acquaintance with this building began when the foundations were being put in, in 1887, as I recall. Prior to the time that the foundations were commenced, there were small buildings, low buildings, unimportant buildings there. I don't recall just what they were, but they were all small. None of them were of sufficient height or weight to have caused any considerable pressure on the soil. On the ground
639 immediately to the north of the site in 1887 along Michigan avenue the Studebaker Building, which I believe is an eight story building, was standing. It had floating foundations. On the southwest corner of Congress and Mich-

igan in 1886 or 1887, before the Auditorium foundations were put in there were small buildings, one and two story buildings. A part of it was vacant. The corner of Congress and Wabash immediately to the south was vacant. Well, the southeast corner of Wabash Avenue and Congress Street was a vacant lot. The Congress Hotel is now standing on the corner of Congress and Michigan south of Congress Street. The portion that I mean isn't the portion that I built. I do not remember what year the particular portion of the Congress Hotel which comes to the southwest corner of Congress and Wabash was built, but it was some time after the Auditorium was finished, several years. At the time the foundations were being put in for the Auditorium Building, Holabird & Roche had been commissioned to build the Tacoma Building and I had been selected as the superintendent of that work and wrote the specifications for the building, and was therefore very much interested in all large building operations going on in Chicago, particularly the Home Insurance Building and the Rookery, the Rookery was then finished, and also the Auditorium. The architects of the Auditorium Building were Adler & Sullivan. Mr. Adler was present on several occasions in conferences with Mr. William Holabird in the office of Holabird & Roche at which I was present. The first conference with Mr. Adler was prior to the putting in of the foundations.

640 There had been criticism of the exterior walls of the Tacoma, as to its construction, in the daily papers. Mr. Adler and Mr. Burnham, Daniel Burnham, and W. L. Jenney came in and inspected the drawings and made a report, which was given publicity. At this second conference again the foundations of the Auditorium were discussed. That simply identified the time Mr. Adler was there in my mind.

Mr. Peck called on Mr. William Holabird during the early construction of the Auditorium. The foundations were just partly in at that time and Mr. Peck discussed with Mr. Holabird the whole Auditorium project, that it was a public spirited project, not intended or expected to be a material financial success, but the city needed an auditorium, and it was his desire to impress Mr. Holabird with that idea, that the people of Chicago should get behind it and finance it.

I saw the work that was being done in the building of the Chicago Auditorium. I was there I presume on an average of every two weeks during the putting in of the foundations, very much interested in it, and also interested in the gen-

eral construction which was carried on at the same time, a good deal of it was being carried on at the same time that the Tacoma was being built; made regular visits to the building. My recollection is that the building was completed the year after the Tacoma was finished. I think that was probably 1889. Since its completion I have had occasion to
641 go into the building many times, several times each year.

The foundations I recall very distinctly were started at a point considerably below the general hard stratum which occurs approximately fifteen feet below sidewalk level at about Chicago datum, and was on clay that was comparatively soft, they having cut through the hard stratum in the operation, and particularly under the stage. These foundations were made of a grillage of pine timbers placed considerably below the lake level. On top of these were a combination of concrete and rail foundations spreading the weight on the grillage. My recollection was that each pier had separate foundations with the exception of under the stage where I recall that was spread over the entire area of the stage. Above the foundations the exterior walls were masonry piers or masonry walls on the exterior of the building, and on some of the cross walls, all of the cross walls, the floor loads generally were carried on cast iron columns, wrought iron beams and girders, tile arches. The roof over the Auditorium was carried on trusses. The exterior of the building was of stone on the three street fronts, masonry walls in the rear and alley faces. The general building is about ten stories high, and the tower is some eight stories higher. The tower is finished with stone on all four faces. The main gallery—
The Michigan Avenue corner of the Congress is occupied by a hotel; the Wabash Avenue corner by an office build-
642 ing, each with its own elevators; the tower portion is an office portion supplied with its own elevators, and the central portion is the Auditorium proper. There are in the hotel approximately four hundred rooms. In the office building for office purposes there are one hundred thirty, or one hundred forty, I should say. The seating capacity of the Auditorium or theater is about 4500 seats. The main floor of the Auditorium has no columns. The gallery is supported on columns, and the upper gallery is suspended from the trusses, at least they have no columns underneath. With the recital hall the theater must occupy fully nine stories. The recital hall is entered off the office building and apparently is above the auditorium. By "above the auditorium," I mean

—I imagine it is in the truss space over the auditorium, apparently so. By using the word "auditorium" I mean the theater portion. The stage is supported, the main floor of the stage, practically all of it, that is, all of the visible portion is supported on piston elevators. I should say the pistons were sixteen or eighteen inches in diameter, and extend down through the foundations, and the entire stage floor may be lowered to the basement floor, or pushed up above the stage, general stage level, twelve or fifteen feet. There are additional traps that are supported on piston cylinders also. Nearly all, the main portion of the floor, is supported on
more than one of the piston elevators. Some sections
643 of it have two pistons. The floors on the main floors
of the hotel, office building and theater are made generally of mosaic, that is, excepting in the theater, the first floor of the theater. The foyers are mosaic, the passage ways. At the time the building was put up there was some marble encasement around the columns in the foyers, some scagliola, imitation marble. I think all the columns are fireproof throughout the building. The entrances from the street levels into the building are intended to be at the sidewalk grade. The office building is on Wabash Avenue, the theater generally on Congress; I think there is an exit possibly on Wabash Avenue from the theater. The hotel is on Michigan Avenue. There also are other doorways in around on the back of the building, on the alley. There is also an entrance, I believe, from the hotel into Congress Street. The hotel has been continuously occupied as a hotel and the office building has been continuously occupied as an office building, and the theater has been in use practically continuously since it was built. There have been no great earthquakes, fires or other similar calamities since the building was put up that have in any way tended to damage the building in a major way—Not to my knowledge. I think I would know if there had been in the city of Chicago. On or about April 2, 1925, I made an examination of the building at the request of counsel for certain defendants in the pending case. Mr. Paul F. P. Mueller, Mr. Frederick J. Thielbar were with me. At first
644 we went up into the office building, from the first to the
top floor, and examined the corridors, probably six or eight offices in various parts of the structure, the Recital Hall, the ventilating pent house, toilet room, main toilet room, and then went into the theater portion, made a careful examination of the foyers of the theater portion of the main floor,

the second balcony, the boxes, went on to the stage, below the stage, and into the engine room; into the hotel portion, only for a moment. I afterwards went back myself and looked over the hotel portion on two or three upper floors and the main floor, didn't go in the basement part. We found the office portion in most floors showed an indication of settlement from the interior columns to the exterior walls, but no indications of serious cracks, no indication that the machinery was not operating perfectly in the elevators; the stairways showed no fractures; the foyer floors show no material cracks. The floor from the first row of columns inside of the exterior walls sloped from those columns to the walls. In some cases this shows I should say 16 to 20 inches of difference in levels. There is a material settlement between the interior columns and the exterior walls. Apparently the exterior walls went down and the columns remained up. The floors show no excessive cracks. The plastering evidently has not been redecorated for several years and shows no serious cracks. There are some slight cracks in one portion underneath the boxes; they were inconsequential, however. The machin-
645 ery is in perfect operation in the stage. There were no serious cracks in the exterior walls on the alley that showed any indication of recent movement; some old cracks.

Mr. Cooper: Suppose we state it in this way: "There were no cracks in the exterior walls on the alley that showed any indication of recent movement."

There were a few lintels and sills broken immediately west of the tower. There are one or two places on Wabash Avenue where a bracket had been put in to support a window head, where the stone had spalled off and unequal settlement.

Stone such as was used in the exterior construction of the building as to durability is considered the most permanent of the building stones of limestone nature, almost equal to granite. It gets harder after it is put in the building, after it comes from the quarry. In 1887 and 1888 caisson construction had not been used in Chicago to any extent under high or great buildings. The usual and customary method of construction used by architects in those days was what was known as balanced on floating foundations. The engineer determined the dead load and live load which would be carried down on any given column or pier, and then determined the clay pressure which the soil would bear without undue settlement, and fixed the size of the foundation of an area that would give, for instance, a clay pressure of, say 3000

or 3500 pounds to the square foot. In 1887, 1888, the engineers of the city generally in their calculations assumed a certain amount of live load. I mean by live load, load
646 to be applied in addition to the dead load. These foundations, generally speaking, were isolated and only rarely combined. The purpose of it was to endeavor to get a uniform pressure for the entire load of the building on the clay so that the various parts would be balanced on the clay and the settlement, if any, would be uniform and not varied. It was generally accepted by engineers that settlement would take place, and provision was made frequently by setting the building up a certain number of inches to allow for this settlement. In preparing those plans for what I have described as the dead load, I mean by that expression, "dead load," what we might call the construction weight of the structure itself. By live load I would mean people going into the theater or furniture in offices and things of that sort. If after the plans were made and the building was started there was additional weight given to the dead load, as for instance, by the addition of more stories or additional rooms, and the foundations were not increased, it would tend to increase the pressure on the clay per square foot, and therefore aggravate the settlement. I have an opinion as to what has caused the settlement under the outside walls. If you mean by "settlement" the variations between the settlement of the outside walls and the inside columns, my opinion is that—if by your question you meant to ask if I had an opinion as to what phenomenon of other matter has caused the exterior walls of the building to go down in the manner you have described, I have such an opinion. It is due to two causes prob-
647 ably first, that all of the clay in Chicago is compressible more or less; second, that inasmuch as the foundations rest on a stratum of softer clay than that at or about datum, there would be a tendency for increased settlement; third, the fact that the site had not in the past been occupied by heavy buildings which in their turn would have compressed the clay, a certain amount of that compression took place on uncompressed clay; and, fourth, the fact that the property across the street to the south, across Congress Street to the south, was largely unoccupied, also had something to do with the more rapid settlement than would be expected if the property had been occupied by heavy buildings, because the clay moves apparently over a large area when it is compressed. The point in the building approximately at which I found

evidence of the greatest amount of settlement of the exterior or interior walls was at and around the tower. I account for the statement I have made that the interior piers and columns therein have settled less than the exterior walls by the fact that in computing the necessary spread of foundations, a certain amount of live load was taken into consideration, and the proportion between the dead load and the live load on the interior columns gives a larger percentage of live load to the dead load than in the case of the exterior walls, and that the settlements have taken place relatively in relation to the relative loads on the exterior columns, exterior piers and the interior columns of the dead load. In other words, the exterior walls, being very much heavier in
648 percentage, bear a much larger percentage of the total load, or live and dead, than the interior columns, which would indicate that they would give faster than the interior columns. If these local differences in settlement have caused a distortion in the interior skeleton construction, which has resulted in a few places in the fracturing of various struts and connections in the framework of the interior construction, and in the cracking of masonry, plaster, and other finished surfaces, such defects or distortions or fractures or cracks could be repaired, without endangering the safety of use of the building? Making such repairs in such buildings in Chicago has frequently been done,—for approximately thirty odd years.

There is generally a way physically by which the levels of the interior columns could be made level with the exterior walls. The column could be shored up and cut off and lowered to the proper level. The resultant movement would probably cause some cracking of the plaster and possibly the mosaic floors, but they could be repaired. If that were done the floors could be made substantially level. That operation could be made without endangering the structural life of the building. It is not a particularly difficult or dangerous operation. I have an opinion as to whether or not the Chicago Auditorium Building was a substantial and solid fireproof building of brick, stone, iron, tile, and such other fireproof materials as were necessary and usual in fireproof buildings in the city of Chicago in the years 1887 to 1890. My
649 opinion is that it is such a building as described. It was then. I have an opinion as to whether or not said building is now safe for use and occupancy for hotel, theater and office purposes. I think it is safe. I think it is safe, and if

there are any moderate defects they can be corrected. I have an opinion as to whether or not the building is now solid and substantial. My opinion is that it is substantial and solid. I have an opinion as to whether or not if said building at all times during a term of years commencing January 17, 1887, and ending August 1, 2085, were kept in good repair and in a safe and secure condition, will continue or will deteriorate until before many years have elapsed it will become unsafe and unsanitary on account of defects inherent in its character and construction. My opinion is that it will remain two hundred years safe and secure with ordinary attention to the wear and tear. I have an opinion as to whether there are fundamental defects of inadequate construction and engineering design in that building of so radical a character as to be fatal to the continued existence of the structure whether in its present condition or with extensive replacements or alterations. My opinion is that it can be maintained without undue expense in a perfectly safe and sound condition. It is my opinion that there are no fundamental defects as to inadequate construction. I have an opinion as to whether or not a greater part of the settlement of the building took place in any given period of the building's ex-
650 istence. That settlement took place, probably, the major portion of it took place within the first five or six years. There has probably been settlement since that time. It would probably be not over 25 per cent of it took place after the fifth or sixth year. I have an opinion based upon what I saw and observed and what I know of the building, as to whether or not there is any considerable amount of settlement going on at the present time. From examination, it is quite evident that nothing—no serious settlements have taken place in some years, no indication of it. My experience with floating foundations would indicate that settlement takes place continuously and if the surrounding—the clay in the immediate neighborhood is disturbed, particularly if it is disturbed below the level of the foundations in a floating foundation building, that additional movement takes place. I should expect the construction of the Congress Hotel, across Congress Street, under the Auditorium, to increase the rate of settlement. The construction of the present Congress Hotel across Congress Street would not have any appreciable effect upon settlement under the Auditorium because those foundations would not go below the hard stratum. The weight of the building would have very little effect upon the plastic

clay. It might have some. The answer I made a minute ago was with reference to the proposed construction of a New Congress Hotel. If settlement now exists in any marked degree, or should increase, or if there is no settlement, and settlement should begin, there is a way by which that settlement can be stopped, by putting caissons under the foun-
651 dations, under the piers and columns. That operation has been performed in the city of Chicago under a building already erected on floating foundations within your experience or observation. It was done underneath the—The south row of columns on the Old Colony Building, at the southeast corner of Van Buren and Dearborn, were placed upon such caissons after settlement had taken place. I think it was in approximately 1900. The north and west row of columns of the Champlain Building, which occupied a site at the northwest corner of State and Madison Streets, was also placed on caisson foundations. The building was afterwards torn down and the Boston Store occupied the site for a portion of that building.

The Fair building, occupying a site between State and Dearborn on the north side of Adams Street, was put upon caisson foundations. That building is, I think, twelve stories. I am not sure. The Old Colony is sixteen and the Champlain was fifteen. That is as far as I recall now. There were several of them projected but not actually done.

I think only the party wall at the south line of the Congress Hotel was put upon caissons, after it was built. It is not an especially difficult operation to perform in Chicago. I have an opinion as to whether or not such caissons can be placed under the Auditorium Building. They can be. The operation would not endanger the safety of the building.
652 The operation would not interfere materially with the use of the building except possibly for a few places in the basement, that is all. Supposing caissons were placed in the Auditorium Building in a good and workmanlike manner, there would not be any appreciable settlement. It would be a small fraction of an inch at most. The entire building could be substantially level after caissons were placed thereunder. It could not be entirely level, but substantially level. Suppose caissons were put under the building and the building were then substantially level and ordinary repairs were kept up on the building, I have an opinion as to whether or not the building so established on such a foundation and so kept on ordinary repair would last until the year 2085 A. D.

in a safe and secure condition. I think it would. Suppose it should appear that during the time the building has been standing certain of the struts had cracked off, there is a way by which the damage thereby done could be repaired if you mean by struts, the lugs or brackets on the columns—they could be repaired by bolting new lugs in place without any serious difficulty. If the column stress, if the loads on the column was up to the limit of the column, those lugs could be strapped on, could be put around the column and secured by straps. Ordinarily speaking, there is enough factor of safety in the column so that they could be bolted on. That operation would not be especially difficult or endanger the operation of the building, not at all. Suppose it appears
653 that filler blocks have been placed under the inside ends of some of the girders and between the bottom of the girders and the top of the lugs so as to take off the strain or weight of the girder from the outside end of the lug on those girders that extend from the first inside piers to the outside walls, I would say that was a reasonable precaution to take to prevent the lugs from being broken off. My opinion that I have given to questions bearing upon the safety of the building would not be altered any if it should appear that some of the exterior walls of the building are as much as one foot, 13 or possibly 14, inches out of plumb. May I amend my answer? There is one other building under which caissons were put. That is the south line of columns on the Unity Building between Washington and Randolph on the east side of Dearborn. That building is sixteen stories high, I believe. Those caissons were put under that building after it was completed, some years afterwards. I don't know just how much out of plumb it was at the time, but it was something over two feet. It is now two feet six or approximately out of plumb. That building is still standing and in daily use. I have an opinion as to this: If there is no major disturbance of clay below datum in the immediate neighborhood, is there any reason why this Auditorium Building should not stand without caissons but with simply nec-
654 essary repairs to keep it in condition and to cover wear and tear for a period of 170 to 200 years. My opinion is that it will stand, and even with major operations in the immediate neighborhood, if they are conducted with considerable care, the caissons may never be required. During this time the building assuming it has proper repairs to cover wear and tear, will continue to be safe and substantial during

the period of time I have indicated. The approximate cost of the reproduction of the Auditorium Building as of February 16, 1923 would be between 75 and 85 cents a cubic foot. The present cost as of today would probably be 5 to 6 per cent cheaper. In the early part of my examination I believe I told you I was connected with Holabird & Roche from 1882 to 1886 as an employe. 1896 it should have been. I was an employe of the firm from 1882 until I became a member of it. During all these years I have been active in building operations in the city of Chicago and elsewhere.

The architects Adler & Sullivan at the time they made the plans and built the Chicago Auditorium were considered one of the major firms of Chicago, very high standing. In describing the Auditorium Theater, I mentioned the main floor and two galleries. There are boxes on the sides. There is a balcony. My impression is that the balcony is supported on columns. I am not certain.

655 There are buildings of considerable size in active use in the loop district of Chicago that were built from 1886, we will say, to 1910, on floating foundations. One is the Rookery Building, southwest corner of LaSalle and Adams; the Home Insurance Building at the northeast corner of LaSalle and Adams. The Rookery, I believe, is twelve stories and the Home Insurance fourteen. That is my memory. The New York Life Insurance Building, northeast corner of Monroe and LaSalle, sixteen stories; the Tacoma Building, as before described; the Monadnock Building, extending from Jackson to Van Buren on the West side of Dearborn; the Old Colony Building at the southeast corner of Van Buren and Dearborn; the Stock Exchange Building at the southwest corner of Washington and LaSalle. My recollection is that is twelve stories. The Chamber of Commerce Building, at the southeast corner of LaSalle and Washington, I think fourteen stories; the Auditorium Building, mentioned in passing. The old Masonic Temple Building, now the Capitol Building at the northeast corner of State and Randolph. I think that is a sixteen story building. Of the buildings similar in construction to the Auditorium, the Rookery, the north half of the Monadnock Block, the—well, the Home Insurance is approximately the same construction. There are others; I

656 can't think of them at this moment, where there is a combination of masonry and interior columns. There must be quite a number of them. They do not come into my memory just now. All these buildings I have mentioned as

having floating foundations are in daily use. I have an opinion as to whether or not these other buildings, particularly those which I say are substantially of the same general construction as the Auditorium, are safe, substantial and secure at this time. They are. Caissons were first used under buildings for foundations in Chicago several years after the date of the construction of the Auditorium. I at this moment do not recall the exact date the first caissons were put down. They were put down as far as my knowledge goes on the west side of what is known as the Stock Exchange Building, southwest corner of LaSalle and Washington Streets. The next ones, I think, were under the Old Colony. That was about in 1900. Caissons have not been put under the Rookery Building at any time since its completion. Not to my knowledge. Caissons have not been put under the north half of the Monadnock Block as yet. Not to my knowledge, no sir. Caissons have not been put under the Home Insurance Building. The Monadnock Block and the Old Colony Building are each sixteen stories.

657 LOUIS E. RITTER, a witness on behalf of Plaintiff, being recalled, testified as follows:

Direct Examination.

I have made a computation of my own with regard to the loading or stresses on some of the structural members of the Chicago Auditorium Building. I examined the two basement columns of the interior of the tower. That tower measures about 35 by 65 feet, average measurement, has 17 floors and a roof. The floors are supported by the walls and by these two interior columns. I took sufficient measurements to get the loads on these columns and the bases on which these columns rest, and I measured these columns and the bases, and I found that the columns are overstressed not less than 40 per cent, and the cast bases are overstressed somewhere between 400 and 500 per cent, that is, the cast bases I should say are at the point of failure. I noted one more thing that I don't know has anything to do with the stresses, but in getting the thickness of the east column,—there are two columns, I call them east and west, in the basement; drilling through, I found the column was filled with water. I let the

water run for about ten minutes to be sure how high it had reached up, and then stopped it up. That can be noted now. That means in freezing weather, if there had been no heat in the basement, there was a danger—. I stated the presence
of the water in the column might have resulted sometime
658 in spliting the column in case the basement should be
without artificial heat in freezing weather. Nothing definite about that, simply a possibility. That covers my test as to the condition of the two columns and the cast bases.

Whether that condition of water in the column illustrates the danger of rust from moisture and other things in a cast iron column I could not say definitely. I would say this: I think if the column were filled with water continuously from the beginning to the present time, so that no air could get to it, there would not be the danger of rust, but I should say if this water in the column were intermittent, permitting air to get to it at some times, it certainly would cause rust on the inside. I have no means of speaking definitely on this particular instance. I could not say from my examination whether that water extended to the top of the column, clear up to the roof or not. All I can say is this, that I measured the flow of the water. It ran about 750 cubic feet a minute. I had a tin pail there and tested in two or three times. The drill opening was 3/16 of an inch. I can say from that roughly the column of water extended at least above the basement ceiling into the story above. That is a matter which could be taken up more in detail because the water is still there. I plugged it up so that if the gentlemen on the other side of the case wish a test made they can send somebody over
there. I can designate to their representatives where
659 the column is. Mr. Wade was there at the time. He
can show them. In the west column I made two borings. In the east column, the one with the water, I made only one on account of the water. Where I made the borings the east column measures 1½ inches on one side and 1⅝ inches on the other. The east or wet column measured 1⅝ inches, as near as I could tell. The water running all over made it rather difficult.

I can give the data on which these assumptions are made. The cast base is 42 inches square and 5½ inches high. The bottom plate of the cast base is 2½ inches thick. The cast base is 2 inches at the top, greater in diameter than the column, which is 18 inches, that is, the top of the cast base is a circle 20 inches in diameter. From this circle, radiating

to the corners and centers on each side are eight ribs 1½ inches in thickness. The corner ribs split into two ribs before they reach the corner. I think that gives you all the data to figure the strength of that base. It is quite possible that the base may be hollow on the inside. I have taken the most favorable condition and considered it solid clear through. The columns are 18 inches in diameter. The west or dry column, the thickness of the metal is 1¼ inches on one side and 1⅝ inches on the other. The east column is 1⅝ inches on one side. The unsupported length of those columns, used in figuring the safe load, is 92 inches from the top of the base to the underside of the girder that runs east and
660 west.

Now as to the loads: I estimated the load on the west column at about 1,050,000 pounds—well, 1,040,000 pounds, and the load on the east column, or the wet column, as 1,080,000 pounds, the load on that being greater due to the presence of a sprinkler tank on the 15th story. The average area of the floor supported by the walls and those two columns was taken at the eighth floor, an area of 35 by 65 feet. The two columns are located symmetrically about the center of the tower, on a line running east and west, and the distance between the two columns is 18 feet 6 inches. From that you can get the floor area on each column. There are 17 floors and a roof. These floors are divided into offices except in the first story, where you have the lobby. On top of this tower is a tile structure. It measures on the outside 9 feet by 18 feet 6, and is 32 feet high, used in the old days as the observatory of the Weather Bureau. That has a roof and an intermediate floor. The walls of that structure are composed, as near as I could get at them, of two 8-inch tiles plastered on the inside and on the outside. I took the load of those walls at 80 pounds per square foot. I took the dead load of the floor at 100 pounds. That is composed, made up, that figure, of 35 pounds for a 12 inch tile, 10 pounds for the weight of the steel in the floor, 5 pounds for the weight of the plaster, 15 pounds for the weight of the floor, wooden floor, and the concrete fill. I said 35 pounds for the weight of the partition.

I should have put that in too. 35 pounds for the tile
661 arch, seventy; 10 pounds for the steel, eighty; five pounds for plaster, eighty-five; fifteen pounds for the concrete fill and the floor, one hundred pounds, that is right. There is a live load of 50 pounds per square foot. These floors, as I say, are all divided up into small offices, and are occupied,

down to the tenth floor. Below that they are cut up into hotel rooms, and occupied. The dead load of the roof is taken at 100 pounds. I disregarded the live load on the roof.

I think I have given you all the data so that you can check up my figures. I think you have all the data.

There is significance, in my judgment, in the fact that the borings in these columns show unequal thicknesses. I think unequal thickness on the two sides shows a possibility of unequal—or stresses due to unequal cooling on account of these unequal thicknesses. That would add something to the overstress. There is another theoretical overstress, may not amount to much—the fact the center of the load being a little off center, off the center, of the mathematical center of the column, but that is a pretty fine hair.

662 *Cross-Examination.*

In computing the overstress I have applied the standards of the present Chicago building code and good engineering. That is the same as the Chicago building code. In figuring the various weights used I have used the building practices that would be used at the present time.

As Mr. Parker did, I had to make an estimate of a good deal of this stuff; for instance, I had to estimate the weights of the various materials. I will give you the basis of my estimates. I measured the thickness of the floor itself. I found it 16 inches, I think. I noted the span of the beams. I am very positive that the beams could not have been less than 10 inches, weighing 30 pounds per lineal foot, the beams used in those days. That would give the weight of the beams in the floor construction as five pounds. By beams I mean the members running north and south. In the same way, I determined the length and weight of the girders, which are the members running east and west. I estimated in a floor of that kind they would use either a 10 or 12 inch tile. A 12 inch tile would be lighter, because while the 10 inch tile weighs less itself there would be an additional 2 inches of concrete. The weight of plaster at 5 pounds is commonly accepted. The weight of the concrete fill and floor, 15 pounds, I think will be considered as conservative, not overweight. The weight

of the partitions at 35 pounds per square foot, 4 inch
663 tile plastered on both sides. These vary on the columns,

on the different columns, from 40 to 55 lineal feet per column. The story heights are 11 feet. Those facts will

show you that the adopted load of the partitions per square foot, that is, 35 pounds per square foot floor area is not an overload. If this base is overstressed according to my computations four or five hundred per cent I don't know how to account for the fact it has been there all these years. That is the beauty of the factor of safety. It is overstressed to that amount. Your own people will probably tell you that, can't help it. The factor of safety is the relation between the stress used and the stress which by experiment at some time or other has shown it to be the ultimate. In between those there are the uncertainties of castings, materials and all that sort of thing that are taken into account by that range of safety. There is not a margin between the theoretical or so-called ordinance or best engineering standard of safety and the actual tensile strength of the material. There is a margin between the working stress and the ultimate stress by experiments. But you have no assurance that in every piece of material you get you will get that same working stress. There is the factor of ignorance. I account for the fact that the base which I say is so heavily overstressed has stood up under pressure by the fact that there is a margin between the so-called standard limit of stress and the actual strength of the material. Just a minute. I won't answer
664 it this way. I will put it another way. I will say it is very very possible that a cast base of the same design and apparently the same iron might have failed with a load of half the load that is on it now. I am told by experts, one of the rules is that they are not supposed to volunteer any information that goes against their case, but for your satisfaction I will say that the load on these cast bases is not as great as it was two or three years ago because some of the load has been removed. But in spite of that I say it is definitely and absolutely dangerous, because of the overstress. Now, this base lies between the bottom of the metallic cast iron column and the capstone of the pier. Yes, a stone that is 65 inches square. I don't know how deep it is. The basement floor comes within eight inches of it, but the possibilities are that it is 12 inches thick, not less than 12 inches thick, and below that I judge would be the rubble and the concrete. This base is not a part of the cast iron column. It is simply standing on it. If the roof were shored up I guess it would be possible to put another base under there. I wouldn't answer that offhand. I do not believe in answering those questions offhand. I would want to look into it. I would want

to know what the means would be to take hold and hold it while taking out that base. That is a question I do not propose to answer offhand. The column itself might be taken out. I do not know how this water got into that column. I did not see any leaking plumbing; nothing, everything
665 dry except when the drill came out, it shot out about ten feet, six feet above the floor. The bottom of the column is completely closed by the cast base. The top is closed as far as it reaches into the ceiling; I couldn't see beyond that. All I know is that the water ran for ten minutes at about 750 cubic feet per minute. The water would not add to the strength of the column while in it. Not to my knowledge, that is a new one. It is not solid. Theoretically it would take from the strength of the column. Assuming that column of water reached 225 feet to the top, the average area of that would be—let's see, 12 inches, 12 inch column, about 75 square inches, about half a square foot; there would be about 6,000 pounds, the pressure of the water. Just a minute; the weight of that column of water at that point where the drill went through it would be exerting the pressure against the sides of the column outward of about 6,000 pounds per square foot. The pressure of water is in all directions. Hence there would be a disruptive element due to the pressure of that column of water on the column itself. The failure of a cast column is a combination of tension, and this water would add to the tension element of that failure element. The question of whether it would add to the safety I would have to answer in the negative. It would act the other way.

I did not open any of the columns above the first floor. I don't know whether there was water up there or not. I assume the water rose above the ceiling line by knowing
666 the amount of water which came out per minute after it had been running eight or ten minutes. These columns are open the same as a cast pipe, end to end. That is the common way of making columns. It is a shell-like water pipe, closed to the outer air, no way of looking in. This open pipe rests right on the base. One column rests right on the top of the other column. Where there is a difference in diameter between one column and another they offset in. The top of the column is cast in the shape of a cap, small cap, which in many cases, not always but in many cases, provides for lugs, one for each corner, to the column and the column above. They are bolted through those lugs. Generally they are bolted together. The columns I have examined would be in the ceiling; I didn't see it.

667 The reading of the deposition of EDWARD A. RENWICK, a witness on behalf of defendants, was resumed.

Cross-Examination.

When I say these buildings I have been enumerating recently are similar to the Auditorium, I mean similar in construction, that is, they are masonry exterior walls and the floors carried on columns, iron columns. Cast iron columns. That is true of all the buildings I have mentioned as being similar in construction to the Auditorium. I know how the beams in any of those buildings are attached to the cast iron columns. In the Tacoma, and I do in the Home Insurance. I think I can say in the Rookery building and the north end of the Monadnock and the Old Colony. In those buildings I have just named they are bolted through the flange of the beam or girder and through the cast iron lug of the bracket on the column. They are supported solely on the cast iron lug in all of the buildings I have just named. Some of them rest on the masonry wall, one end rests on the masonry wall, and one end on the lug. In any one of these buildings the bases are supported with reference to the columns, cast iron columns, generally with the beam resting on the lug or projection of the column. In some cases solely on the lug. In a few cases there is a vertical lug to which the column is also bolted. Well, in the Tacoma building in a few cases we had vertical lugs to
668 which we attached as well as the horizontal lugs. The vertical lug would be a projection from the column an inch or more in thickness and extending usually from the horizontal lug up vertically, to which the beam is attached by bolting through, through the lug and through the beam. In the case of the Tacoma it is bolted through the beam itself. The vertical lug is a part of the column. The vertical lug is a part of the column itself, in that case over there. The horizontal lug attached to the column is a part of the column cast on it. In all the other buildings which have cast iron columns of the same character as I have just described with reference to the manner of attaching the beams and lugs. The ordinary method is to attach the lug to the horizontal lug only, attach the beams to the horizontal lug. In the case of the Tacoma especially the vertical lugs were used with the idea of producing a little more

resistance to wind. That was the idea. Theoretically it would make a little better cross tie, possibly. There are other respects in which these buildings you have enumerated in answer to Mr. Cooper's questions as being similar in construction to the Auditorium, constructed in a different way as to the character of the columns and the method of attaching the beam to the column. I think they are all very similar to the Auditorium.

I don't suppose that the brackets are exactly the same design in each one of those columns, but they are similar
669 designs and the attachment is similar; can't be exactly the same.

The foundations in all of those buildings were spread foundations, and none of them rest on wood grillage that I recall except the Auditorium. This had that distinction. They all have either rails or beams combined with concrete. My recollection is that in the Auditorium they used old railroad iron for their grillage, in part at least, I am not sure it was all that. That was the customary construction about that period, to use old railroad iron for grillage, crossing it. In the case of the Tacoma we used rolled I-beams instead of railroad iron. The principal difference is that it permits a thinner foundation, that is, less distance from the bottom of the plate to the clay. By using rolled I-beams, they are stronger for their weight than old railroad iron. You can thin up your concrete bed. You set the I-beam on its edge. It is set on the flange with the web vertical. That is to say, the I-beam is set with its greatest width perpendicular; that is, vertical. And in the case of the old railroad iron, the same method is followed. We used several depths, from 12 to 15 inches, as I recall it, in the Tacoma, and railroad iron is about five inches in depth. When we used the I-beam in the Tacoma we enclosed it all in concrete. The concrete was greater in perpendicular thickness than the perpendicular height of the I-beam. I would not say a concrete foundation built so with an I-beam would permit of a thinner concrete bed than if
670 railroad iron was used. The entire distance from the bottom of the plate under the column to the clay underneath can be thinner with that treatment than with the railroad iron for the same strengh. You could have a wider spread of foundation in that way than with the rails. The rails are not particularly strong as against bending.

I do not know exactly what the area of the grillage under any of the interior columns of the Auditorium actually is.

The Monadnock and the Rookery, the north end of the Monadnock and the Rookery and the Home Insurance building are all built under similar ordinances. I guess the same ordinance, and their thickness is determined by that ordinance. They should be about the same. Some are higher buildings. I have not actually measured them but the piers in the Monadnock block are upwards of five feet thick. The piers in the Auditorium are upwards of four feet thick, I should say, under the tower. There are parts of the exterior wall of the Auditorium as thick as the walls of the Monadnock building. The exterior walls of the Monadnock were four feet thick at the bottom. The Auditorium walls at the tower, I should say are about the same thickness. They are thinner under the ten story portion than they are under the tower. In fact, at some places you have columns in the first floors and no masonry at all. In the store front extension walls there are columns there now. I don't know whether they have been
671 removed and placed there but there are columns there now. The thicknesses at the base of the Auditorium exterior walls are different. The exterior walls on the alley are one thickness. The exterior walls on the street fronts, because they are pieres, are thicker. I should say the walls at the alley of the Auditorium, at their base, were approximately 28 inches thick, in the first story, 28 to 32. On the Auditorium the piers of necessity would have to be considerably thicker than that. The piers under the tower are heavier than the piers under the remainder of the building. Just how thick they are, I can't tell you. Approximately, they are something like eight or ten inches thicker in the tower than under the hotel or the office building where the piers still remain. The exterior walls of the Auditorium facing on Michigan avenue I should think those piers were close to four feet deep. The exterior wall on the Michigan avenue front is carried down in piers as I recall it. I never counted the piers on the Auditorium exterior wall on Michigan avenue. I should think there were about fifteen or sixteen. They are sixteen or eighteen feet centers. Between the piers in some cases there is stone and some cases glass. About ten feet, nine or ten feet. From the outer line of one of these piers to the outer line of the next pier is about ten feet. I should think so, about nine or ten feet. The piers are about upwards of five or six feet. That is my impression of it. This is not the same char-
672 acter of construction that is used on the Congress street front. There is more well surface on the Congress street

front. A more solid wall. There are piers, but there isn't so much glass, not so much opening. My opinion is there are in the neighborhood of twenty-two or twenty-three piers on the Congress street front, I should say. I should think they are approximately five to eight feet wide. They vary. That space between their outer lines of about ten feet is filled in in a good many places on Congress street with masonry, that is, it isn't all openings. I make a distinction. I should say there is a space of approximately ten feet between the piers, which is not so thick as the piers. I don't know how thick that space is as a rule, never measured it. I don't know, never examined it.

On the Wabash avenue front, in the first floor, there is a treatment of the stone front that makes that different. My recollection is that there are some columns there in place of piers. I may be in error. The glass front is carried out in front of the stone work and more or less conceals the construction. I don't remember whether it is on piers or not.

The extension columns are supported at the bottom on floating foundations. On the same sort of wood grillage I described for the rest of it. It is not my understanding the wood grillage I have described is continuous with the line of the exterior wall except as I recall it there was some provision made at either side of the tower, where they had
673 connected up, but generally speaking, those were isolated piers. The isolated piers rest just on the clay. There is the wood grillage in there the same. As I recall it, there was wood grillage under all these foundations. The wood grillage is not a continuous wood grillage. It consists of separate sections, one for each pier or column, except each side of the tower, which I recall was combined with the tower foundation. It is not my understanding except under the tower and immediately contiguous to the tower, there is a continuous line of wood grillage which furnishes the footing upon which the exterior wall rests, whether those walls are columns or piers. I didn't so state. They are isolated and not continuous. It is my recollection that there is an isolated grillage under each pier and under each column. There was an isolated grillage under each pier with a combined grillage underneath the tower, and as I recall it, the next adjoining pier each way. Where there is a column instead of a pier, there is isolated grillage under that column, except as to the stage, and there I think, that is one mass of grillage there underneath the stage.

The exterior walls other than the street fronts are continuous. The grillage is continuous under the exterior wall except the street fronts. I mean by the exterior wall except the street fronts, the alley wall, the west alley wall, the south alley wall and the east alley wall. When I say the exte-
674 rior walls except the street fronts, I refer exclusively to the alley walls, and of course the division walls between the properties north of the Auditorium. That rests on a grillage, except on the Michigan avenue frontage. There as I recall it, those are on—there is a private alley there and I think they are on separate piers there, but the wall adjoining on the north on Wabash is a continuous grillage. I am now talking exclusively about the north wall or walls of the building when I talk about walls other than street fronts. The Studebaker building, I think, is supported on columns, as I recall it, at the north line,—a series of columns beginning at Michigan avenue and going west. Those I think are cast iron columns. That is my impression, as I recall it. I know there was foundation up next to that wall at the time I examined it over there. I think that is still on grillage, my recollection of it. Each one of those columns is on a separate grillage. That is my recollection. I should think they were somewhere around eighteen feet apart, somewhere around eighteen to twenty feet apart. Eighteen to twenty feet between centers, I suppose. I don't know how large the grillage is under any one of those. I have just a general memory of the thing as I saw it in progress. It is a wood grillage, as I recall it, when I visited those foundations, all wood grillage. I meant the base was wood grillage. Above that is railroad iron and concrete. That is true of all these where I have referred to grillage. I think that tower is about sixty to eighty
675 feet square, and as I recall it, that was practically covered with grillage. I do not think one continuous grillage. I think it was intended to carry around the enclosing supports of the tower in one continuous—may have been hollow in the center, may not have carried across the center, but I remember it was well excavated out. It looked as if they were going to put it in a mattress over the whole thing,—the tower, the supports under the tower. It was all done under the stage, I remember distinctly, but I don't recall there whether the center of that was—the clay was covered or not.

When I referred to the connection between this grillage or foundation in the tower and the adjacent walls or columns, I mean that instead of having an isolated foundation adjoin-

ing the tower on the east and on the west, they combined those tower foundations with the column foundations so that there would not be a direct settlement which might be—it would spread the settlement over a larger area. The tower foundation was approximately rectangular. That is, there would be wings out on the Congress street face of that tower reaching to the next set of piers east and west of the tower, I should say sixteen to twenty feet from the rectangular grillage, eighteen or twenty feet, somewhere, both east and west. I don't recall what the width of the grillage is under the exterior walls of any part of it. I suppose it was somewhere
676 about 8 or 9 feet wide, as the impression is on my mind, after 40 years. These east piers, in the exterior walls, had a wide base and then gradually decrease in width as they rose in height from the foundation up. They were on grillage and then there was a pyramidal foundation on top of the grillage. I do not recall what would be the approximate width of the pyramidal bottom, the bottom of the pyramid. I couldn't say. It reached out to about the width of the grillage and then tapered up. As I said before, by impression is that the width of the grillage was somewhere about 8 or 9 feet. It depends on where you take that. There are some of these piers that were carrying more than others. As I recall, there were quite a number of cases on the front where there are piers from the upper stories, that is intermediate piers, transferred to piers on either side, over the arches in particular. There are arches, as I recall, at the entrance, and so forth, which are carrying double loads.

The exterior wall pier would be about 8 or 9 feet wide, somewhere in that neighborhood. It depends on whether you take the single ones. The single ones might not have been over 7 or 8 feet but the double ones probably were up as high as 9. The double ones were generally at these arches entrances that I speak of. They are not at the entrances but at the arch face, as I recall it. That front has a number of arches and then lintels and then arches again and lintels.
677 It is broken up on the first floor. I think the broken lintels were in the upper course of granite, which is about the third story. It must be about the third story. There was one marked one on the west side of the tower, on Congress street. One has quite a little break in one of them, and the other is merely a crack. There is one on the east side of the tower and one at about the second bay; not a very serious

crack. What I mean is that one is just an opening and the other is where it slipped by and shows quite a little movement. I should think, from the street, I should judge it to be about three-quarters of an inch probably. It might have been an inch, probably. It is broken entirely through the sill. That is, the principal break is through the sill. The lintel is cracked above. There is one other lintel I noticed on Wabash avenue at about the third or fourth story, and back, I should think it was about the third bay, back north of the corner. There the lintel was broken and cracked through and one of the jamb stones was spalled in and it seemed they had put in a bracket there to support it. It looked as though it might be an iron bracket of some sort covered over with galvanized iron. That is what it looked like. I don't know what it was. There were a few other sills or lintels, at the place I have mentioned, that were broken, but not very many; very few of hem. Altogether, less than half a dozen, I should say; not over half a dozen.

We examined the columns in the office building and in the 678 hotel and in the foyers, the principal columns we looked at. There were none in the auditorium except under the balcony. In the office building we followed back the columns from the piers to get their location. They are not very evident because they are all enclosed in partitions. These columns were on the 9th and on the 6th and on the 5th, as I recall it, in the office building. I observed in the hotel portion of the structure only those columns in the first floor, the exposed columns in the first floor. There are several of them there. When I speak of the auditorium I mean really the theater part of the Auditorium Building as distinguished from the rest of it. At other times and as the context shows, I might have meant the building as a whole. I would hardly want to take that as theatre all the way through. I didn't see any indication of movement of these columns in the hotel portion of the building that I have mentioned. I did not see any indication of change of any kind since the construction of the building, only as I stated before, the floors sloping from these columns to the opposite walls generally. I observed nothing in the columns themselves.

In the Auditorium or theatre portion of the building the columns I observed there were in the foyers, especially. Also those under the balcony and they were the only ones, the foyer and under the balcony. Well, all of them across the front of the balcony, particularly at that point. That at-

tracted our attention to the fact that the balcony fascia
679 seems to be in the form of an oval; that is, it is down at either end and sets up in the middle. That indicates that the settlements have taken place at the outside walls and not markedly so in the interior columns. I did not actually measure but it looked as though the difference in settlement between the outside walls and the interior columns might be 16 to 20 inches. The largest settlement that I observed in the building at any point was, I think, around the tower. The most marked settlement occurs at the columns at about the east line of the tower. Perhaps it is the next column north of the east line of the tower. From there to the outside wall is the most marked settlement and it looks as though it was over 20 inches. I didn't measure it. I hadn't any facility with me to level across but it looked as though it might be over 20 inches. Maybe 20 to 22 inches. That is the impression that is in my mind. Well, I would not say the largest settlement of any kind, at any place in this entire building that I observed did not exceed 22 inches. The difference in settlement between the ends of brams. I would make a distinction that way. The most marked settlement was around the tower. It is impossible to say. The sidewalk is down a good deal from the level of the sidewalk at the corner of Wabash avenue and Congress, immediately in front of the tower. I should think it was upwards of 20 inches. I don't know. I simply compared it with my eyes. I could not say whether it was 20 inches. It might be 22 or 24 inches.
680 Well, now, whether that sidewalk was initially at grade or not I don't know. I have no means at all of ascertaining how much settlement has occurred in the building, at any point, betwen the time of the construction of the building and the time that I examined it this month. I would not be in a position to get that. That is an engineer's job; a civil engineer's job. It would be very difficult to give it approximately. They may have filled up the street or they may have raised the sidewalk or done a lot of things that would remove your mental bench marks. I don't know. For the purpose of expressing an opinion in this matter, it does not make any difference, in my judgment, how much settlement has actually occurred in the building between the time it was built and the present time. It had all gone down together, there could not have been anything wrong with it except the inconvenience of having floors below the sidewalk, but it did not all go down

together. That is the point I have been covering, that it did not go.

Now, assuming that it did not go down all together, it is not important, in my judgment, to know how much it did, in fact, go down, at any particular point or points, not unless the remaining beams—remaining column stood where it was originally placed. It is the difference in settlement and not the total settlement that is really vital. That is vital. The greatest difference in settlement that I observed in this building, at any two points was at the column either on the line
of the east line of the tower or the one immediately east
681 of that, I am not certain which, from that column to the Congress street wall was the greatest apparent difference in settlement. That difference would amount to as much as 22 inches. I would not be surprised. It seemed to be. It would not amount to more than that. Not a great deal. I think I can tell within two or three inches. The fact that the difference in levels was half a foot more or less than the figures I have assumed, in expressing my opinion, would not have any material significance. A foot would not; two feet would not. It might reach a point where the beams would be too short to reach the distance and then it might be serious. That would be the principal circumstances that would make it significant. I think that would be about the only thing. I could not say anything else. It is a matter of stability; keeping your beams supported.

I could not tell what is the size of the footing under these columns that are on the interior of the building. It is only my memory of 40 years or 38 years or 35 years. I don't know. I couldn't tell you. I saw it many times but I couldn't tell you. I could not tell now even approximately. As I recall it, the 4 beams or girders coming into each column, they themselves would be ties between the adjoining columns. I don't recall any other method of tying. Suppose one of these beams
did slip out; the difference in level would be such that
682 the beam would be detached from the column. In my judgment, the effect upon the building would be normally, it should drop down; that is, that section of the floor should drop down. As a matter of fact, it does not always drop by its own weight. It might show some evidence of sudden lowering in level, in which case it would be caught and held. It would affect the integrity of the structure only temporarily. It could be fixed easily. There are several things that you could do. One is to bolt a bracked on of sufficient length to

catch it and another would be to take out the particular girder or beam and replace it with another. Another method would be to take out the column, if necessary, and cast a new column with lugs to receive it. What would be probably the simplest thing to do—the most inexpensive thing to do would be to put a steel bracket attached to the column. Well, when you say "best" method to adopt, from an engineering point of view, it depends on just what you mean. It would be sufficient to put it back in as strong a position as it was when originally placed, and I would say that that would be the best method.

I went into the basement, about the 2nd of April, with Mr. F. P. Mueller and Frederick J. Thielbar. We went underneath the stage and into the boiler room. That is all. We went around in there, where we could see all of it. We did not go back of the boilers in the boiler room. We went
683 around the front of it. We noticed some little inequalities of floor, nothing very serious, only minor settlements and cracks. We observed some little inequalities in the floor, some little inequalities—some cracks along the partitions. In the front of the boilers that is all I saw. We went along a passageway and I don't remember just where it was, to tell you the truth. In the basement. That was all. It was a passageway. I really don't know where it led to. There was one place where there was a small partition jutted out, I should think a couple of feet, into the passage, and probably was 6 or 7 feet wide, apparently a tile partition, plastered that had several cracks in it, and that was about under the boxes on the south side of the theater. That is all the evidence of settling or other disturbances I saw in the corridor, other than the inequalities of the floor in the outer level; the difference of the floor. The floor of the passageway and the floor of the basement generally. There were several places there where the floor would slope in the same way. Under the stage it was not very much. It was, I should think, about 6 inches; 6 or 8 inches, apparently. In the passageway there was one point that we went through there that looked as if it might be considerably over a foot; perhaps 16 inches. Yes, I think that covers everything. I did not see any columns where the lugs were broken. I did not see any columns where there had been any evidence of repair or attempt to support
684 the superstructure.

Turning to the other buildings that I have mentioned, some of them. It is evident that the Rookery Building settled. It was before it was raised; several years ago. It used

to pitch in there toward the building at one time. I should think it indicated a settlement of perhaps 7 or 8 inches. There are several places in the Rookery Building that show evidences of settlement in the past. In the lobby—in the rotunda, downstairs, the floor was out of level in a number of places. Well, I should say it was 8 or 10 inches out of level at the time when it was most out of level. I mean by that between one column and another it was 8 or 10 inches. It might have been more than that. This was in the rotunda. I do not recall now that I saw anything else, at any time, in connection with the Rookery Building, to indicate a settlement. The outside walls of the Rookery are masonry piers and the inside are cast iron columns. There are some granite columns in the outside walls. As I recall it about every other pier is a granite column. I presume these granite columns in the Rookery Building rest on masonry piers. I do not know what they rest on positively. I think that covers everything —all of the evidence of settlement, if any kind, in the Rookery Building, of which I have any knowledge.

The Home Insurance Building is considerably lower than it was originally built. It has gone down. It has gone down very evenly. There is no evidence of uneven settlement
685 in the Home Insurance Building, of which I have any knowledge. I don't recall anything that is very marked. There are piers used in the construction of the Home Insurance Building. In the exterior walls there are piers. There is a column imbedded in the pier. In each pier, as I recall it. I suppose there are somewhere in the neighborhood of 16 to 20 such piers in that building. There are granite columns or piers used in that building all through the interior. They have brackets, horizontal brackets, and a vertical lug in most cases. I don't know whether it is in every one but those that I saw when it was built had. The beams are bolted through the horizontal lug and also through the vertical, if my memory serves me. I was over there a great many times. I think that is right. The Home Insurance Building has not settled evenly. That is, it has gone down but it has not gone down evenly, but there are no marked differences between adjoining columns or adjoining piers. It is not very marked. Well, any settlement sufficient to break the sills and lintels would be what I would call a marked settlement. I should think that was my guess on that, I should think it was 4 or 5 inches in settlement. That would be the maximum. That is as far as my observation goes. I recall one line of piers that

seems to be down more than that. That is on the north end of the building. That is the only case. I never examined
686 it to see; just in passing.

The Monadnock Building; the north half of that building is similar in construction to the Auditorium Building. It is masonry exterior supporting walls and cash iron interior columns. There are no columns or pillars in the exterior walls. There has been a great deal of settlement all over it. It has all gone down. The Monadnock Building is down probably, a total setlement, of 15 or 16 inches. It did not settle evenly. The greatest differences in settlement in that building, of which I have any knowledge, are I should think 14 or 15 inches. That is between one column and the next; the one column and the exterior wall. It occurs on the west side of the building. The most marked place that I recall now is on the west side of the building, about the elevator shaft on the north section. Several places under the east and west wall, between that and the central columns there has been a good deal of settlement. Well, approximately as much; not quite as much as that. I should think it was upwards of a foot, though. If the settlement in the building—difference in settlement, instead of having been a foot, had been 2 or 3 feet, in my judgment it would have significance as affecting the integrity of the structure only if the settlement caused the ends of the beams to be pulled off from the base on the pil-
lars. Suppose they were pulled pretty badly but not
687 enough so as to be actually pulled off, that would indicate nothing but what could be repaired easily. With regard to the best method of repairing such a condition, putting on a collar on the beam or pillar, as I have described, is one of two things. If it is convenient, I should prefer to take the basement column out and replace it with a shorter column and lower it down and cut it off. To sustain the building during that process I would shore up the column, It is a simple matter. I would grasp the column, the column above. Put a clamp on it and put a support underneath it and lift it up and slip out the column and put in the new column and lower it down. That method could be done on the Auditorium Building. It would be the best method in this way. It would remove the public's apprehension of trouble by the unequal settlement. It would do away with that. As far as its stability is concerned, I do not think it would be necessary to do it. I do not think I could just leave it alone, without doing anything to it, up to the time that the beam fell out, but if

you find, on examination, that it is in danger, I would put on a new bracket. I think it would be a very simple matter to open up the ends of those girders and find out whether or not it was in danger, and find out how much bearing they had. I think any engineer would know when he reached the danger point. I should not want to answer that question in specific inches. Suppose the loads that were on the girders all
688 indicated that they were carrying any load that, from an engineering point of view, they ought to be allowed to carry, that would not affect the problem of a method of solution but it would be impossible to say here a definite number of inches that would apply to all cases. You could not do it.

In the Auditorium Building I have not observed any of the beams and girders where a fracture is marked or where the settlement has been such as to dislocate the relationship between the beams and the column. I haven't dug into it. There are comparatively few buildings similar to the Auditorium Building if, when you say similar you mean similar in construction, to-wit, the masonry exterior walls and interior walls and interior cast iron columns. Just about that period the skeleton of construction came in and there were comparatively few high buildings built. Just about the period that this building, the Auditorium, was finished. Prior to that we had any number of buildings in Chicago, four or five stories high, that are similar in construction, where all sorts of settlments have taken place. There was one right next door to you, the Studebaker Building, owing to the settlement in the Auditorium. I recall seeing that lintel adjoining pitching down apparently 15 or 16 inches. That was slipping down, showing a marked settlement right adjoining you there.
689 That occurred following the erection of the Auditorium Building. I know it is not there now, so I suppose it is repaired.

When I spoke of buildings "similar" to the Auditorium we were talking of floating foundations. In that respect there are a large number of buildings that are similar, having floating foundations. The number of high buildings, as I said before, that have exterior walls in masonry and interior cast iron columns, are comparatively few. In the direct examination when I said "similar to the Auditorium Building", I meant similar in regard to the foundations; that is, floating foundation. Later I testified that there were certain buildings that were similar in construction, which is a little different point of view. The nearest approach to it is the Rookery

Building, and the north end of the Monadnock, which is strictly masonry construction with—cast iron columns on the inside. The Home Insurance is a slight variation, having a combined masonry pier with a column inside of the masonry. All the other buildings that I have mentioned in my direct examination, among which are the New York Life, the Tacoma Building, the Old Colony Building, the Stock Exchange, the Chamber of Commerce Building, the Masonic Temple, are similar in the character of haivng floating foundations. They are a little different in construction, some of them. The New York Life is what is commonly known as a skeleton construction; that is, there are columns which carry the exterior walls and the exterior walls become simply an envelope borne
690 floor by floor on the metal construction. The Auditorium is masonry and therein lies the difference; masonry piers. That is the main difference. The interior columns are very much the same except in the case of the New York Life. My recollection is that those are steel columns. The beams are riveted directly to those columns either onto the plates that support the girders or onto plates which are riveted to the columns. Probably none of them rest on the tops of the columns, except the roof, possibly. I don't think any of them rest on any recesses or pockets in the columns; that would be unusual. There are floating foundations under the New York Life. I never examined them specially. I saw them in passing; that is all.

The Tacoma Building has floating foundation. It is masonry interior walls. The exterior walls are supported on columns. It has a skeleton construction, with the exception of the interior dividing wall; the skeleton construction happens to be cast iron and iron instead of steel. This change in the character of the construction amounted to a revolution in the art of modern building construction. I think the Monadnock Building was built 7 years after the Auditorium. It is much higher, but it is a narrower building, more like a tower, and thereby more dangerous from settlement. Serious settlement might throw it out of plumb. In the case of the modern skeleton construction, and that of the bearing wall construction, the same method was used in spread foundations up to the
691 point that we were able to drive piles with a steam hammer and then the next step in the art was the caisson which, today, is the last word, we suppose. We might find something better. We did pass from the floating foundations to the piling. Originally piles were driven with a drop ham-

mer. That caused so much vibration to adjoining buildings that we were enjoined from using it. And then the steam hammer came in, which strikes a moderate blow but a very rapid one, and then we were able to drive piles. That was the next step. I should say that the first piles driven here in town was 1895 or somewhere along there. The steam hammer for driving piles came in at that time. The other method of driving piles had been in vogue prior to that for many years, but if you would attempt to use it in the loop district you were usually enjoined. The caisson is the best method we know today, better than the piling with the steam hammer, because the caisson that goes down to the underlying rock, puts your building on the most secure foundation that we have. There is no danger of settlement and there is no danger of any disturbance, no matter what might happen. Probably you could not drive piles, even with the steam hammer, down to the underlying rock. I do not think anyone has ever attempted it but I don't think you could. Over the underlying rock is about 10 or 12 feet of very hard gravel clay that no pile would penetrate. Above that is very soft clay, varying in thickness
692 and varying in consistency. Where the bedrock is 100 feet from grade, I suppose it is somethere in the neighborhood of 60 feet, or more or less, soft clay, of varying density. It is soft enough so that you can set a pile up and the weight of the hammer would drive the pile probably half its length. The bedrock in the loop district runs down from about 95 to 105 feet, something like that, and frequently there is 10 or 12 feet of gravel above that, and then above that there may be a strata of sands. Occasionally we strike a sand stratum, verying densities of clay, and sometimes a little gravel in it, but in a general way it is a soft clay up to where we reach a point about 20 feet from the inside grade. Then we have about 4 or 5 feet of a firm blue clay, which comes approximately to datum, about 15 feet below grade. Overlying that is usually 2 or 3 feet of yellow clay loam and sandy loan, and above that is ordinarily filling, here in Chicago. In the loop district it is artificial filling. As you get over toward Michigan avenue you frequently meet sand strata 50 or 60 feet down. We never found any quicksand in the immediate loop district. We found some south on Michigan avenue and some north on Michigan avenue, but in the loop district it is unusual. When the Auditorium was constructed, I should think the bottom of those grillage beams, as I recall it, were 20 to 22 feet below the sidewalk grade. I think they went

through the blue clay. I know that was a matter we had under discussion on a good many times. I think the stage
693 portion is manifestly down into that soft stuff. It is down several feet further. There has been a good deal of settlement in the New York Life Building, not so very uneven. It was a fairly balanced filling. I don't know if I could give in inches the greatest difference in the settlement of the New York Life.

694 In the Tacoma Building, there has been a good deal of settlement. The most marked place was north and east of the elevators. I don't know how many inches it went down but the shaft went out of plumb about 8 or 9 inches. I would not put it that the difference in the level of the settlements between that point and some other point would be 8 or 9 inches. I really don't know how much it was but the difference in settlement caused the wall to go to the northeast 8 or 9 inches out of plumb before they put the elevators in. That was while the building was under construction. The Tacoma has gone down I should say, a full foot. As a whole. It was set up 4½ inches above the sidewalk when we started, above its normal grade, to allow for settlement, and then it went down beyond that about 8 or 9 inches, as a total. Now, the most marked difference in settlement, and that is the one that interests me, is right in front of the elevators and included in the elevators. It is from the wall southwesterly. The wall went out of plumb about 9 inches before we put the elevators in. Nothing was done to correct that, except to line up the shaft anew. There was no attempt to repair the levels of the building itself. We moved some of the beams to give us a vertical shaft. The building was up and plastered.

The Old Colony Building is a skeleton construction
695 building. It has interior columns and they are on floating foundations. The exterior walls are skeleton instead of solid masonry. They are really supported by the steel skeleton structure. The Old Colony Building has settled. The South end of it went down about 22 inches, and the rest of the building 8 or 9 inches. It started down about 8 inches at Van Buren Street, and 22 inches down at the south end. The last two rows of columns were the ones that settled very rapidly and excessively; and that was stopped by putting caissons under them about 3 or 4 years after the building was up, somewhere around 1900. It was done by cutting through the foundations as small a hole as we could, to work there, and sinking a caisson underneath the foundation, shoring the

building and holding the building while we did it, but putting jackscrews under each column that we were working under, holding that column while we sunk a caisson, and when that column was back on its caisson we took the next column. The jackscrews were spread out on the foundation. We did that, yes. There were separate foundations under each of these columns that we shored up, approximately 8 or 9 feet square. We spread the timbering around the best we could, over the space that was not occupied by foundations, and the two adjoining foundations, and built up a cribbing and stuck jackscrews on top of the cribbing. Then we dug a hole for the caisson foundation down to bed-rock. We got right under
696 the column. The settlement had broken the connections between the girders and the columns on the Old Colony Building prior to the time when we did this, between the south two rows and the third row north. It had torn out the rivets and we thought it was getting in a position where it needed to be taken care of. If it was allowed to the point of actually falling, I should think it would be dangerous. If it is approximately that condition where something was liable to happen if it was not cared for, I think that is the time to care for it. When I say "dangerous" I mean it has got to reach a point where it is in danger of falling, I should say, before it can be dangerous. If it won't fall it is not dangerous. I cannot differentiate. It has got to go to a point where it becomes imminent of actually falling before it is dangerous; if the bearing is reduced to a point where something is liable to happen, then I would say it was in a dangerous condition. If a building was in such a condition that the construction of other buildings or foundations for building in the neighborhood went below the level of the floating foundations on the first building, if the first building were on the type of the Auditorium it might need your careful attention. I cannot answer whether it would be in danger unless I know the condition of the building. It might not be dangerous and it
697 might be dangerous. In the case of Auditorium Building, I don't know the condition of the various parts. Possibly I don't know how much bearing might be left; how much more settlement could take place before it would reach the imminence of danger.

In referring to the construction of the balcony in the Auditorium, I hesitated before because I could not remember whether that balcony is on posts or is a cantilevered construction. The gallery manifestly is on posts. That is, the second

balcony is on columns. I think the first one is also but I am not so clear about that. I don't know for certain whether there is any wood in the construction of either of those balconies. I am positive that the main part of the floor is fireproof; whether it is built up on that in stages, I am not sure. By the main part of the floor, I mean the general floor level; the general floor is fireproof; I mean the structural portion of the floor, if you differentiate. As I remember seeing those balconies, they are built up of T-iron and tile. What the steps are made of I don't recall now. It is possible that the various steps on which the seats rest are wood, but that would not make any difference, in my judgment, on the other matter if it were so. I would not call the seats part of the structure. I was in there a number of times. I would say, as I recall the thing, that the structural part of the balcony is built of steel and tile. I don't think that has anything to do with the
698 stability of the building. I think it might have a good deal to do with the question whether it is fireproof. If it is of wood construction and no fireproofing in it all, I would say that it would have some bearing, in calling the building a fireproof building. I would not call it a fireproof building if the floors were not fireproof. If the structural floor was fireproof, I do not think the blocking up to get the various levels of seats would cut much figure. If there was not any blocking up of the structural part of the balcony or its support, I do not think it would make any material difference if it was all wood. It would still be considered a fireproof building. I do not think it is as good construction as concrete. I do not think the columns and other structural members in the Auditorium Building are covered with concrete. I think they are covered with tile, most of them. If some of them were not covered with tile that would not have any bearing on the answers I have given as to the character and condition of this building, because that would only be affected by fire. That is not necessarily a safety matter, as compared with defective construction. I am fairly familiar with the requirements of the present building ordinance of the City of Chicago. Under the ordinances there is to be a percentage of alteration before they compel you to comply with existing ordinances. My recollection is that it is something like 50 per cent. It
699 would be possible to put caissons under the Auditorium Building and to make the necessary changes structurally above that, without complying with the present ordinances as to fireproofing. If that were not true, it would not affect

my answers as to the feasibility of altering the interior construction of this building, so as to make it safe; that simply becomes a matter of expediency. You can make it comply, by putting on additional tiling and additional concrete and that sort of thing. That would add to the load that would be necessary for the structure to bear. It would add in the right place too, because the interior columns are the ones that are up. I could go in and fireproof the structure, above the foundation columns, without adding so much to the load as to affect the stability of the structure. I would like to undertake it. I think the matter could be easily solved with a careful study. I have not made any computation. The work I have described is leveling up the beams or holding the beams in place, if that is what you mean. I think the simplest way probably is to put brackets on. That is the simplest thing to do, to put the brackets on the columns where they are broken. The second method would be to lower the columns: take out your basement column and either cut it off or, if that leaves you plenty of metal, cut it off, if not substitute another cast iron column, shorter by the amount of the settlement or approximately the amount of the settlement, and set it in place and gradu-
700 ally lower the structure to this new position. That would involve a good deal of cracking of plaster, probably some of the floors. The mosaic would be cracked, but when it is done the appearance of unequal settlement will be removed, the beams will then be in their normal position, and no longer be in any danger of pulling off the supports, and, on the whole, I think that is the wiser thing to do. I would go in the basement where the columns are, and if their sinking amounted to 2 or 3 feet in places, I would hold up the structure above the basement column by jackscrews or some other method of shoring. Then I would cut that 2 or 3 feet off the top of the column or substitute a column 2 or 3 feet shorter in place of the column that is there now. That is the first thing. Then that 2 or 3 feet which is left between the top of the column and the floor above and all the floors, all the way up, I would drop down gradually so that it would rest on the column; shorten the column. I would not drop it all of a sudden but I should watch it as it came down and see what the effect was. I should think it would take about a week to lower it down. There should not be during that week, anything to be alarming at all. You would have to watch that the ends of your beams that were in the wall, and see that there was

clearance enough for it to go in. There would be a number of things that would have to be done. It cannot be done blindly. It can be done. It should not be done one column at a time.

It should be done simultaneously, all over the area en-
701 closed, we will say, in the four walls. It would take to the walls surrounding the stage. And the next step would be between the proscenium arch and the office building, I guess. There is one wall in there. And then the last step would be from the—office building; it may not be necessary to do anything in the office building. That is not so urgent. The Auditorium portion of it is where the public sees it constantly and creates comment. That is part of it that I think ought to be done; what you might call the middle portion, the foyers particularly. That is where the greatest disturbance is, around the tower, and around the tower I should think would be the place, if any lowering was done at all, that is where it would be needed. I think the middle section is all that is urgent. Every building that has a floating foundation is more or less out of level anyway. It is not uncommon. I would rest my supports in the basement, during this process, on the floor. And cribbing which is on the basement floor; the shorer's cribbing, the beams that he uses to spread his weight. We would not disturb the foundation proper under the column. We would rest our jackscrews or shoring, on the foundation of the column, while we were cutting it off. There is no difference. It is carrying the weight now. I think that would be entirely feasible. We would not require any new founda-
tion on which to rest our jackscrews or shoring. It might
702 spread the beams a little beyond the foundation, but it is not necessary. I think there would be less severe disturbance if this middle section of the building were carried down in one movement. I cannot conceive of any danger of anything happening to the structure during the process. I do not know any place where that was ever done, but we have reversed it. We have raised them, it is the same proposition. I don't recall any place where an operation of that sort has been performed, but there have been some places where I have raised buildings by some such process as that. We raised the upper story of the Mandel Building, and put three new stories in between. It was one story high that we raised and we lifted it up and put in three stories under it. That was up on top of a nine story building. We have the support of all the rest of the building below us in that process. Nothing had been happening to the rest of that building, below the upper

story, prior to the operation. There had been a slight settlement; not very marked, an inch or two.

We took the Emanuel Baptist Church. That was moved about 50 feet and raised 7 feet. That was a much more difficult undertaking than it would be to shore that up. We put it on jackscrews, lifted it up and put it on rollers and moved it 50 feet south, and then raised it 7 feet and put in new foundations. Now, that involved a good deal many more operations than this would involve over here. And then you have a very high spire over here and it was fully as heavy a
703 building to move, that is, weight per square foot. It is probably as heavy as the Auditorium is at that part.

Another case is that we held up the Champlain Building, a 15-story building, and put in caissons underneath the foundations. No columns were cut off but we destroyed the foundations underneath. We had to cut a hole right through the foundations. That was about 1913, I believe. The building is fifteen stories high. The Columns adjoining the foundations, at the foundations that we were to put the caissons under, were steel columns, and we bracketed onto these columns steel brackets to which were attached a series of girders, and the jackscrews—they were hydraulic jacks we used—were placed under the girders so as to get a full bearing under the entire wall. And then the curbing was spread out over the floor, as far as we could get it, under each column, and the hydraulic jacks were put in each section and the building was raised sufficient to simply free the column from its base. It probably was not over but a sixth or eighth of an inch of actual lifting, but it was lifted up before we made any move. And then the base plate was removed and the grillage foundation was cut through with oxy-acetylene flame, cut through the bottoms and top at the concrete, to form a hole about four feet in diameter, and then we went down through that and put in a caisson clear to the rock, that is 110 feet. I think 7 were done. That building, prior to this operation, was on floating foundations that settled rather seriously and unevenly in
704 a good many places. It pitched back to the northwest, about a foot, at least. That is my recollection; about 12 or 13 inches. The elevators were on the wall which was supported by the columns we were operating under. They never for one day stopped operation. They were in good condition but it shows you that the operation could be carried on without disturbing the tenants above.

The other building was on floating foundations. It was a

skeleton building. It didn't have any bearing walls, like the Auditorium.

The Fair Building was held up. That is a skeleton building; it had floating foundations. That is the essential comparison. It has steel columns and skeleton construction.

We are right now preparing to put caissons under the Monadnock Block, which is exactly like the Auditorium; the north half. We have the figures in on it, incidentally. We have detailed plans for doing that. I am not sure whether those plans are available for examination or not. The scheme has been worked out and whether it has been put into the form of an engineer's drawing, as yet, I am not certain. It has been done tentatively, and the method outlined to the contractor and the bids obtained, but whether the drawings have been completed or not, I am not certain. They will be completed, certainly within a month, but it may take several weeks before it is done. It is possible to make the plans and estimates available for examination before having the engineer's drawings, but are we supposed to furnish that information, as an expert witness? I have got it. It is in our files. It is over there and it can be seen. It is true you didn't introduce the subject; I brought it in. I think the plans and methods we prepared could be furnished. We would be very glad to have your engineers go and see it. We are doing that work for Aldis & Company, as agents. The scheme is reaching a point where they are about ready to start with the work. Well, it may be a month or six weeks. It depends on how the building acts, in connection with the adjoining property, which is being developed; not so much on the bids as on whether the building is being affected by the sinking of the deep basements in the Union League Club. The sinking of the deep basements of the Union League Club has compelled the agents and owners of the Monadnock Building to take up this question. In my judgment, the situation there has not developed at present to a point where it would be dangerous to permit the building to remain without doing this work. We kept very careful records, right along, every day, and they haven't started their deep excavation yet, and therefore we are waiting to see how the thing moves. When it does move, we will have ample opportunity to take care of it. I don't know as I anticipate that when they do reach their deep excavation, the building will move so that it will require some such thing as I have described; I fear it I fear it so much that I thought it is the part of wisdom to get ready for it. If the

705

deep excavation should occur, I think that building is in such a condition that there would still be plenty of time to
706 come in and do this work. The estimate of time to put them on screws is 30 days. After it is on screws we will leave it there until their operation is completed. We would not take the screws out while the menace was going on. It might be two or three or four months that they would be standing on screws, waiting for the adjoining operation to be completed. The danger if they went down to the deep excavation and the building started to sink unequally, would be overturning. They are making other excavations in that neighborhood; there is one on the opposite side of the street. They are putting in caissons over there, yes. I believe that is also going down below the foundations of the Mondanock Building, I don't know personally. We would not give any consideration to that excavation, as to its possible effect upon the Monadnock Building. It is across a wide street and their foundations do not come anywhere near our foundations. At the north side it is only a short distance across there. It is only 9 feet away, which makes it much more serious. On the supposition that there was not any excavation at the Union League Club but there was across the street, on the other side of Dearborn Street from the Monadnock Building, and they went down below the foundations of the Monadnock Building, I would not think that would have in it the slightest element of danger to the Monadnock Building. When I spoke about the Auditorium Building and the possibility of an
707 effect upon it of deep excavations, there is a possibility of development of the Congress Hotel. It has been published in the paper as being one of the projected things which occupies the site almost opposite the tower. I don't know whether that would be close enough to possibly affect the Auditorium Building substantially. It probably will cause a little additional settlement. That is what I stated in my direct examination. I don't think it necessarily jeopardizes it. It might be sufficient to pull the girders off their supports; it is possible. I would feel a little more secure against any sharp settlement if the foundations rested on the upper stratum of hard blue clay. When any excavation occurs in the neighborhood of a building, it does not have a tendency to draw off the moisture from under the building, that is not what happens, drawing the moisture off; it is the actual movement of the clay. Drawing the moisture off hasn't anything to do with it. Whether the construction of a subway in Michi-

gan Avenue or Congress Street or Wabash Avenue would have any effect upon the stability of the Auditorium depends on the methods used in the construction. If those walls are held in place, if they are properly shored so that no movement of clay can take place, there is no jeopardy. I do not think any such thing as withdrawal of moisture occurs. You could draw it away but it comes in as fast as you draw it away. We have not found that moisture affects it. In other words, the clay is not dryer outside of our excavation than it was prior to the excavation. I have heard there has been discussion among engineers of the question of withdrawal of moisture having an affect on buildings, but I do not be-
708 lieve it. I presume there are engineers of high standing who disagree with me about that. I question the high standing of some of them.

The Old Colony Building had floating foundations and skeleton construction. The Stock Exchange Building has caissons on the west line of columns, and the rest of it has floating foundations. My recollection is it is entirely floating foundation except the west line of columns. It is not steel skeleton; it is cast iron columns and iron beams. The Stock Exchange Building in a general way is similar to the Auditorium. I never have examined it for settlements; undoubtedly it settled some. I just recall the sidewalk is very flat there, that is all.

The Chamber of Commerce Building, is like the Auditorium, I think; I think that is masonry construction with iron columns. There have some upper stories been added on. I think those were steel, but I do not recall what the old stuff was below that; from the general appearance of it, it has settled. The sidewalks are flat where they should be on a slope. That would be on a sixteen foot sidewalk at least five and one-third inches. I know it has settled at least the amount of the slope of the sidewalk.

The Masonic Temple, I think, also has cast iron columns, iron beams, and floating foundations. I think it has col-
709 umns. I think that is a skeleton building. I am not sure about it. I know it settled, very unevenly and very extensively. I never have examined it to find out whether there were fractures. When I went over to look at the Auditorium Building the elevators were running, all of them. They are operating right along. That is all I meant when I said the elevators were all right, that I found they were operating right along, going up and down. The thing that interested me

most was that the stage elevators were operating without any trouble, because they are very difficult. I saw them raised up once. I did mean the general elevators in the building. They were all operating. I wouldn't say that they were the latest type of elevator, but they were in operative condition; they were not put out of commission. I think some of them are hydraulic. I saw evidences of it down in the basement of the Auditorium, but I don't know what they are. I suppose the oldest hydraulic elevators in a hotel, office or theater building of which I have any knowledge would be about twenty-five years old. We recommend taking them out at the end of thirty years, no matter what they were. In this process of raising and lowering this structure two or three feet when we cut off these columns down in the basement, there would be no danger to the plumbing except what could be remedied easily. Replace the stacks, fixtures or whatever happened to be affected by it. It can be rapired; it is not anything 710 that has to do with the structural part of it.

When I said the building could be maintained in good safe condition "without undue expense," I meant extraordinary expense. I imagine that if it is found necessary on examination to replace a bracket because the beam or girder which it supports is nearing the danger point, that the expense would not be more than a few hundred dollars in any one case. The number of such beams and brackets cannot be large in the building. I am confining this estimate to just the work to make it secure, that is all, to do the least that you have to do to make it secure. As to the total expense of making the building secure against every contingency, that involves the possibility of having to put in caissons and lower columns and so forth. Your plumbing and elevators have already had their useful life. They are dead. They should have been replaced long before this, and that I would not consider as part of the structure, or anything to do with it. That is maintenance. The other, probably a million dollars or a million and a quarter would do the job. Leaving out your plumbing, but taking care of what would be normally the structural part of the building, to lower it and put it in the best possible shape that way, and put it on caissons, and support it against every contingency that might ever arise in two hundred years, I would say a million and a quarter for it. That estimate of a million and a quarter is confined to the changes in the building; to make the building secure struc-

turally. Nothing else. The contingencies that we are go-
711 ing to protect against are items that have been brought up either by your questions or my answers; the possibility of a building going up across the street on Congress Street, and subways; any other building in that immediate neighborhood, not necessarily across Congress, but north of it, I think that is all.

I don't know of any building similar to the Auditorium, that would serve a useful purpose for comparison, in addition to what I have been asked about on cross-examination. Practically all the old buildings within perhaps the limit of four to six stories in height are similar in many respects to the Auditorium. I thought it was a little beneath the dignity of the Auditorium to compare it with them, but they are the type; they are the old style, and many of those are scattered around the town. It is a little different condition and I didn't think it was necessary to mention them, but that was the culmination of the old construction. They are all on floating foundations; they are masonry construction and generally with cast iron columns in the center, and that is what I tried to convey by that remark. Those buildings are not necessarily all obsolete; some of them are. It may be that a building has not any commercial value now. There may be some reason for that. I don't know. For their height they are just as good a type as they ever were. If you want to go up with a higher build-
ing you have got to change the type in order to meet the
712 emergency. For the purpose of this answer I should say the Auditorium is a high building, ten-story building. You would not entirely have to change the type in order to meet the emergency there, but it is advisable to do it, because you get better rentals out of it. I don't know whether the Auditorium Building is obsolete from the point of view of its use as a building. I have not looked into it. I don't know When I said on direct examination that it would cost approximately seventy-five to eighty-five cents per cubic foot to reproduce the Auditorium in February, 1923, that figure was on the theory of reproducing it in exactly the type of building that it is, with thick walls and deep reveals and everything else just as it is, obsolete or not. I think costs have dropped about five or six per cent since February, 1923. I have not made any figures as to what the cubic footage is in the Auditorium. I based that on my knowledge of the construction and the records that I keep in the office on those cubic costs. It is just a general idea based on a building of somewhat that

type; I didn't take off any quantities. I have not made any examination of this building structurally at any point in the building where any of those columns that have settled are located for the purpose of seeing how I would handle the situation at that particular place or column, but I have a very definite recollection of the construction as that building went up. I was over there a great deal and very much interested in it, and I know in a general way what conditions we
713 would have to meet, more in detail than it would be if I had not made the examination. I think you would be a very unwise engineer if you did not go in and make a very careful examination before you did anything. An engineer might express an opinion in a general way of what could be done if certain conditions were found, and that is what my statement was based on. That is the only opinion I have undertaken to express here. It is a general opinion with a general knowledge of how those things were put together and what you would do under a given case. I do not think there would be any danger of affecting, except superficially, other parts of this building if we started in to make the changes in the basement in regard to the supporting columns or pillars to which I have referred. Not structurally, there wouldn't be any material danger, no. The columns have not settled as much as the walls. It is the walls that have gone down and left the columns up. Now, theoretically, and I am basing my judgment on that, they were at one time all level; that is, the beams were generally level when the building was erected. Therefore, if they are lowered down it puts them back into the position they were originally, and therefore it could be done without structural damage. It would have to be examined into to see there was nothing blocking in behind where the beam pulled out; that the stuff had not fallen in so that it could not go back to its position, but that is a mere matter of handling it. If it could go back to its original position,
714 then it could go down, because it was once in that position. I make the statement that if it is in an unsafe condition that it can be readily put into a safe condition. If there were certain beams that have insufficient bearing now, they can be given a proper bearing at a nominal cost. I do not know whether there are certain beams that are off their bearings or not. They may be, but they could be remedied. That is the answer. Apparently now superficially building is in a safe condition. The opinion I have given that it can be made safe was expressed without having made anything other

than a superficial examination, except my general knowledge of that type of contsruction and that particular building. It is based upon general information and experience that I have had, but upon a purely superficial examination of the building itself.

What I tried to say in my direct examination about a live load was that engineers at that time were inclined to add in their calculations too large a percentage of live load, which later engineering experience dictated should be omitted. In other words, they put live load under the column and carried it down to the foundations. Now with an interior column you have got a large area of floor and a small amount of dead load. When you go out to the outer walls, you get a very large dead load but a comparatively small live load. We found in experience that the buildings that stood up best, that is, that traveled together when they settled, it was best
715 to disregard all live load, so as to only take care of the dead load, because the live load is apt not to be there. If it is there it is only there for short periods. The Auditorium might be filled with 4500 people, but they are only there for two or three hours, and for some reason or other that live load does not set; you take it away and that impulse does not get through to the foundations. That would be true of a hotel and office building just the same. The best engineering experience which came in the early nineties on these floating foundations eliminated all live load in the calculation of the pressure of the clay. What we were aiming to do was to balance these foundations so that each square foot of foundation, be it under an inside column or outside wall, should have the same pressure on the clay, and to get that bset result we omitted all live load in our calculations. We have to figure only the dead weight which was intended to be carried in order to get this distribution; that is merely to determine the interrelationship of the parts. You might say a higher factor of clay pressure; we would go up, and instead of 3000 pounds clay pressure when we figured live load, we might go to 3500 pounds pressure on the clay, using only the dead load. When we still figure the live load instead of dead load that is for your stability of structural parts. I am only talking about the pressure on the clay, for the distribution of floating foundations. In the Auditorium I have a con-
716 viction—I do not know anything about it—but I have a conviction that they used in their calculations the live load, and that is the way I would account for the interior col-

umns staying up and the outside walls going down; that the percentage of live load on the outside is so small and on the columns themselves so large, that that would account for it. That was in accordance with the best engineering practice at that time; we were inexperienced, all of us. We had fairly good formulas for all stresses; yes; I would say that. It has been worked out since then. Later we got into steel columns, with very much more refinement than there was in the cast iron column, but we certainly knew the margins of safety at that time in cast iron columns. There has not been a great deal of change in regard to the margin of safety on the cast iron column since that time. I don't think we changed the factor of safety of cast iron column materially over what we had then. The figuring that was done then was in accordance with the accepted practice at that time.

Redirect Examination.

The art of architecture has been a developing art. We cannot say what will be done forty years from today in regard to strains or stresses. If it should develop that the grillage was continuous under the walls everywhere, I do not think the continuity of grillage would have any material effect on my answers on cross-examination as to stabil-
717 ity even assuming my answers were made on the assumption that it was not continuous. If it was continuous I would not think it was the best practice, the best thing that might be done at the time. Speaking of the exterior cracks in the lintels, I was not present when it cracked, but every indication is that the cracking took place within the early life of the building. They are not recent. I am able by looking at a structural crack to form an opinion as to whether or not it is of recent origin. I did not see any cracks that had the appearance of recent origin in the exterior walls. It does not make any difference with reference to the making of the repairs I have described whether the lugs on the columns are cast as part of the column or otherwise attached, if they are securely attached. These columns are tied or bolted or fastened to each other, end to end. There is a flange cast on the top of the lower column and another flange on the bottom of the column above, and they are bolted through together. That was the ordinary method. In speaking of the amount of settlement that has taken place in the Auditorium, for instance twenty-two

inches and so on, I mean the difference in settlement between the two adjoining supports, either piers or columns. If the stage floor were not level I would not expect the hydraulic cylinders used for raising and lowering the stage to work, if they were out of alignment, and if they are out of level they are probably out of alignment. If there
718 had been a serious settlement they certainly would have been out of alignment.

Referring to the Monadnock Building and north part of it, I think it was built in 1893. In that building, in which I spoke of a difference in levels between columns or between columns and outside walls amounting to about sixteen inches, the columns and the outside wall where this settlement occurred, were about eighteen or nineteen feet apart. The sixteen-inch settlement is in a space of eighteen or nineteen feet. The settlement of any of these buildings is not due entirely to the hardening of the soft clay caused by the pressure of the weight of the building. Settlements have occurred quite as often by the movement of the clay as by the compressing of it. We find that on a building that is adjoining a vacant lot. It is a fact that it is the weight on the soil that causes the settlement; if there wasn't any weight on the soil, presumably it wouldn't settle. That being true it does not make any difference as to any degree whether a building on a floating foundation is of solid masonry construction like the Auditorium or of a skeleton construction like the Tacoma Building. In these buildings I have testified to as being on floating foundations but having a skeleton construction, the settlement is still due to the factor of weight, and the difference is only in degree.

The Champlain Building, which I spoke of as having settled "seriously" at one corner, which we consider a de-
719 cided settlement, rather than two or three inches which we would overlook. In other words, it drew our elevator shafts out of line and caused more or less trouble from that. It has nothing to do with the security of the building, however. If foundation caissons were put under the Auditorium it would not make any difference as far as the foundations are concerned, if we should add loads by fireproofing the balcony or otherwise. It is conceivable that by fireproofing the balcony you might have a dead load there that would affect the supporting columns. They might have to be changed if that were so. That would change the columns which support the balconies or any other structural members

that supported the balcony. In answer to Mr. Fisher's questions about cutting off portions of the columns, and the mention of cutting off two or three feet, I did not mean to imply it would be necessary to cut off two or three feet, or any particular amount; only such amount as would be necessary to bring the floor to approximately the level of the floors at the exterior walls. I would not know without making a measurement what that amount would be.

Recross Examination.

These two or three feet I did give myself as my best estimate of a difference in settlement of twenty-two inches. When I talk about cutting it off, I am not necessarily talking about cutting off at least twenty-two inches at those points.
720 It would not be necessary to lower it to a perfect level. It could be made to approximate it. It might be kept up. It might be an advantage not to lower it more than perhaps sixteen inches, but it would remove the appearance of that decided toboggan that occurs right there at the doorway, which is unfortunate. It is not a thing necessary to do for the stability. That would not be the question. It is the appearance of stability that you are fixing. That is what I had in mind. If there was a difference in the level of twenty-two inches we might let six inches of it go and have that difference persist. I would want to look at the thing and see what was involved in lowering it the twenty-two inches before I did it, if I were asked to make a careful estimate and report.

Redirect Examination.

So far as my information now goes, it is not necessary to cut off these columns and make this leveling process to maintain the safety and stability of the building.

721 ANDREW REBORI, called as a witness on behalf of the Trustees of the Estate of Charles A. Chapin, deceased, and certain other defendants, testified as follows:

Direct Examination by Mr. Hurlbut.

I am an architect, with offices in the McCormick Building, Michigan Avenue, Chicago, Illinois. I have seen the seven sheets of blue prints attached to a stipulation in this case now handed me. I examined these blue prints in connection with an easement agreement dated February 1, 1887, between the Studebaker Brothers Manufacturing Company, an Indiana corporation, and the Chicago Auditorium Association, an Illinois corporation. I also measured up the parts of the building of the Chicago Auditorium Association situated on parts of lots 18 and 19 in Assessor's Division of Lots 1, 2, 3, 4, 5 and 8 in Block 9 of fractional section 15 to Chicago, and checked the same up with the seven sheets of blue prints which I have here, and found that the blue prints are true diagrams of the parts of the building now on said property which they purport to portray, excepting in so far as a departure from said plans purports to be authorized by an easement agreement dated September 30, 1887, between the Studebaker Brothers Manufacturing Company and the Chicago Auditorium Association. I have seen Plaintiff's Exhibits 18 and 19 before. Exhibit 18 is the document which I referred to above as the easement agreement of February 1, 1887; and Exhibit 19 is a certified copy of the easement agreement which I referred to as dated September 30,
722 1887. From my examination of these easement agreements, in my checking of the line dimensions and legends on the seven sheets of blue prints which I have before me, I state that these seven sheets of blue prints are true copies of the plans and specifications referred to in Article 6 of the agreement dated February 1, 1887, between the Studebaker Brothers Manufacturing Company, a corporation organized under the laws of the State of Indiana, and Chicago Auditorium Association, a corporation organized under the laws of the State of Illinois, except that on the sheet No. 5 a portion has been tinted red, to indicate that portion of sheet No. 5 of the original drawing, which was tinted gray to indicate the part of the driveway of the Auditorium building

which might be built over by the Studebaker Brothers Manufacturing Company.

Mr. Hurlbut: We now offer in evidence the seven blue print sheets, with the stipulation entered into between the Chicago Auditorium Association, by Fisher, Boyden, Kales & Bell and Homer Coolidge Chapin and others, by King, Brower & Hurlbut.

(Whereupon said document was received in evidence and was marked Chapin Exhibit 1 and is certified herewith as a part of the record.)

Mr. Hurlbut: We also offer in evidence the deed from the Studebaker Brothers Manufacturing Company to the corporation of the Fine Arts, dated March 18, 1903, conveying sub-lots 13, 14, 15, 16, 17, 18 and 19 in Assessor's Division of Lots 1 to 5 and 8 in Block 9 of Fractional Section 15 Addition to Chicago, recorded as Document No. 3,364,555, on the 18th day of March, 1903, in Book 8140 of Rec-
723 ords, at page 565. We offer the document and the recorder's certificate.

(Whereupon said document was received in evidence and marked Chapin Exhibit 2.)

Mr. Hurlbut: We also offer in evidence warranty deed of The Corporation of the Fine Arts Building, a corporation organized and existing under the laws of the State of Illinois, to Emily C. Chapin, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, as trustees under the last will and testament of Charles A. Chapin, deceased, conveying lots 4 and 5 and the north 26 feet of the east 169 feet of lot 8, all in block 9, in Fractional Section 15, Addition to Chicago, otherwise described as lots 13 to 19, both inclusive, in the Assessor's Division of Lots 1, 2, 3, 4, 5 and 8 in block 9 aforesaid, recorded as Document No. 5,601,636, on the 29th day of March, 1915, in Book 13,360, of the records of Cook County, Illinois, at page 108.

(Whereupon said document was received in evidence and marked Chapin Exhibit 3.)

724 PAUL F. P MUELLER, Witness on behalf of Defendants, testified as follows:

Direct Examination.

I live at 1445 Granville Avenue, Chicago. I am a contractor and builder. I left the profession of architecture some thirty odd years ago. I did not receive a technical training in architecture. I went through the government school of mining and civil engineering in the Saar Basin, Germany, and I passed my examination for the polytechnic, but came to Chicago in 1881. I went to work here with various architects and draftsmen; was engaged by the Aetna Iron Company, Clark, Raffner & Company, and S. S. Metner, engineers; also superintended the erection of steel structures. At present I am engaged by the Continental & Commercial National Bank to look after their interests in the construction of the Morrison Hotel. After I was with the Aetna Iron Works, Mr. Adler engaged me to work on the steel construction of the Auditorium Building. Well, we had, of course, all the buildings that Adler & Sullivan built in those days. I was in their office for seven years, had charge of their office, and when I was in there six weeks, Mr. Adler turned the office over to me as foreman. Instead of being the designing engineer I became foreman of the whole office. There was the Standard Club and, of course, a great many manufacturing buildings that we built in those days. There
725 was the McVickers Building, remodeling the Hooley Building, consultations about Carnegie Hall in New York, in connection with Mr. Tunnihill, the architect, remodeling of the Pabst Theatre in Milwaukee, the Pueblo Opera House in Pueblo; plans for the hotel in Salt Lake City; and there was the Kleiber Building on Wabash Avenue. We had the contract for the Schiller Building. I was secretary and consulting engineer of the Probst Construction Company, which had many of the buildings at the World's Fair. I have had experience in connection with many buildings in the City of Chicago. I was called on to go to Japan and built the Imperial Hotel there about six years ago. I built St. Paul's Roman Catholic Church in Chicago for Mr. Schlack. That church is built with masonry walls, Gothic architecture, without any steel or other reinforcing. At the Holy Name Cathedral, I cut into the apse

and moved it 150 feet to the rear and put new foundations under it, and there was new foundations put under the tower. The tower leaned out 13 inches into the street, and there was caissons put under the tower. I don't know exactly how high those towers are, maybe 120 or 130 feet. They are of masonry construction. I think it was the year 1883 that I first went with Adler & Sullivan. The first thing I did with them was to start on the diagrams for the Auditorium Building. I was first engaged as engineer and then afterwards I was put in charge of the office. I was with them for seven years. We had about between 30 and 40 draftsmen. We had a number construction engineers. There was Mr. North,
who is at present chief editor of American Architecture.
726 He made out a design of these stresses. Then there was
Mr. Angus, an engineer who has been for thirty years with the Chicago Building Department, as designing engineer. Then there was Mr. Strobel, as consulting engineer, and Mr. Marburg, who made the drawings of the stress and theatre part of the building. These men worked on various works and, of course, my time was mostly taken up in making drawings of the engineer and architects and draftsmen working in harmony. And they had a number of other engineers, like the Sanitary engineers, and stage engineers. Mr. Adler was very apt to have almost an expert for every branch of the building that was built. Mr. Adler himself was active in the supervision of these maters. He himself was an engineer. He had been through the technical school in Detroit, and then he volunteered for the army in the Civil War, and was soon after that appointed to the Engineering Corps, which he served on through the Civil War, and he also at that time made the acquaintance of Mr. Colonel Sooy Smith, who, at the time of the Auditorium Building, was consulting engineer for the foundations and other matters. We all knew these men were reputed as being the best men he could get hold of. As far as I could see, Mr. Adler did all he possibly could to get the best men for every particular line of work. When the question of stage machinery came up, he took a trip to Europe and took the stage manager of the Auditorium
along, to get the stage machinery which was at that time
727 available after the Ring Theatre fire in Vienna. He
brought those plans back and they were worked over to American mechanism, and for that effect he engaged Mr. Herman, who was reputed as one of the best elevator machinery engineers, and he worked with me on the drawings to get

the stage machinery working. The lay-out of the kitchen arrangement for the hotel, when that was to be made, Mr. Southgate sent his chief steward from New York, and that was all laid out according to their plans. In all these matters Mr. Adler usually consulted the people who wanted to use it, and made an effort to make it the most satisfactory that could be done. There was not one general contract for the building; it was let separately. The steel construction was Smead Iron Company in Louisville, and before he would award that contract to them he sent me to Louisville to see what their facilities were and what their reputation was. Mr. Adler sent me down there. The steel was let to the Carnegie Steel Company. At that time they had just opened their steel hearth in Homestead Mills, and the trusses and part of the theatre was let to the Keystone Bridge Company, of which Mr. Strobel was consulting engineer, and he was very often in the office consulting Mr. Adler. The shop drawings were made by Mr. Marburg, who afterwards became Professor of Civil Engineering of the University of Pennsylvania. Mr. Osborne and Mr. Lichter, they are the sanitary engineers. The steel men, of course, they were the best in the country, and the masonry work was let to John Agnus, who, of course, had a very high reputation; and Mr. Lichter, who testified here, had a very high reputation. He was a good man
728 when I saw him working on this building I made up my mind when I would go into business he would be my partner, and so it happened Mr. Lichter became my partner afterwards. The granite work was let to Hinsdale, who was very well reputed, at least. The stonework was by Reed, one of the best stone men we had in the City of Chicago at the time; and the setting of the steel was let to McGuire, and the fireproofing was let to the Illinois Terra Cotta Lumber Company. That was porous terra cotta. It was mixed with sawdust and burned, and in burning the sawdust out, it would leave the terra cotta porous, which would leave it much lighter, and was considered fireproof. In connection with this fireproofing, Mr. Adler had consulted P. B. White, who was one of the originators of the fireproofing, and Eiger & Beidler, of this Terra Cotta Lumber Company. I knew Ferdinand Peck by sight. He was very often in the office. In fact, quite often I complained that there were too many conventions in the office, on account of the draftsmen did not do enough work. They couldn't do work fast enough. He was constantly in touch with Mr. Adler, and even when it came to the layout

of the theatre he consulted Mr. Daly, at that time a very noted stage theatre man. Mr. Adler had men in Pittsburgh who reported to him on the progress of the work in Pittsburgh, and once or twice he mad a personal visit to Pittsburgh, to see that material before it would come on. The superintendence of the building was in the hands of Capt. Neiman, an experienced builder, in the employ of Martin A. Ryerson, and he was engaged by the Association to be there continuously on the premises, to see that the work was
729 carried on properly. He was employed by the Association direct. Prior to that he had been with Martin A. Ryerson. These various plans went through my hands before they were completed. There was so many drawings of the Auditorium made of it that they spent nearly all their commissions making drawings. They spent nearly $60,000 making plans for the Auditorium. There was a complete set of plans for the building. In the preparation of the plans and specifications of the materials that went into the building, the Chicago Building Code then in force and effect was consulted. Of course, there was a good many things came up that the Chicago Building Code used at that time did not cover. And then Mr. Adler would consult the officials, and sometimes we would have to wait until a certain decision would be given. We also had in the preparation of these plans, the tables and formulae that had been compiled by authorities who were leaders in their field at the time, and Mr. Adler insisted on us using the formulae that were laid down in the handbook on engineering, and we used 16,000 pounds of stress on the steel and 12,000 on the cast iron; of course, modified carefully according to the loading and so forth.

Generay Sooy Smith was consulted as to the foundations, and they put testing tanks upon the premises, and loaded it and watched it, and finally loaded it heavier until it sank, and they arrived at the figure, and they told me to figure two and one-quarter tons on the square foot for all the foundations, and then the weights were all tabulated and put in a book, and all the steel columns were recorded in a book, and Mr. Adler would check those up. I know at one time I spent six weeks at Mr. Adler's house, and every night we would
730 go over the matters that came up during the day, and he would check it up in his own house before he would tell us to go ahead. The men were all educated engineers that worked on it, and afterwards they became noted engineers; some of them. Mr. Adler died, I think, in 1900. Mr. Sullivan,

of Adler & Sullivan, died some few years ago, while I was in Japan. Mr. Probst died, too, I think, while I was away. I had a set of the plans of the Auditorium. I am very sorry they were burned up. Mrs. Mueller burned them up ten or twelve years ago. When I left Adler & Sullivan and went into the building business, I was interested in the settlement that was going on in the Auditorium at the time I was still with Adler & Sullivan, and then I was engaged to put in lintels with iron brackets to support them. I am familiar with the construction of the building, as I remember it from the time it was designed and put up, and as my memory has been refreshed by recent visits. I heard Mr. Lichter describe the foundations. I consider the description that he gave of it substantially correct. The grillage under the walls, and everywhere except under the tower particularly, went down about four feet below city datum, and under the tower, I think, one foot more. That was necessary to keep the timbers continuously immersed in water. The wooden grillage under the outside walls is practically on the same level as the bottom of the piers through the building. The tower was lower, because we needed the timbers to make the offset. The sand
mentioned by Mr. Lichter as being under the grillage
731 was put there, I think, for leveling it, and I think for giving the water a chance to be conveyed there and be on the bottom of the timbers. I think there was crushed stone all around this to facilitate the conveying of water around the timbers. Water will not ordinarily permeate through clay. Most of the clay we have here in the City of Chicago is water tight. Rubble masonry is masonry that has no particular size to it. Plaintiff's Exhibit 51 shows rubble foundations under the column. Some people call it bridge masonry. It could not be compared with our ordinary Chicago rubble masonry. That is a typical portion of the construction of the tower. The piers of the front wall are dimension stone. The bearing capacity of dimension stone as compared with stone that is not dimension stone in the building, or rubble masonry, is a great deal better. You can load a great deal more load on it. In the ordinary rough rubble masonry there may be round or irregular-shaped stones. They are supposed to bond them and the mortar helps them. Of course, ordinary common rubble masonry is not as efficient as the masonry used in the Auditorium Building as to weight carrying capacity. There is not very much mortar in this dimension stone masonry; the beds are fairly level. This dimension stone masonry was used

in bridge construction until the concrete came in use. Concrete can be made much more economically, and in combination with steel is used more than that now. Except where they do use concrete on bridges, this dimension stone, such as is used on the Auditorium, and just identified by the 732 photographs, is the kind they use.

I looked at Plaintiff's Exhibits 76 and 77, which were produced and identified as samples of stone, mortar and cement taken from the building, at the time they were offered in evidence, and have looked at both those exhibits again just now. The mortar shows that it is just as strong, if not stronger, than either the brick or stone that was in connection with it. If it was poor mortar, it would come off freely. As to the fact that the mortar has clung to the brick, so that in chipping out the mortar a piece of the brick came with it, I think the Auditorium walls are about as good walls as we have here in the City of Chicago. Selected brick went into those walls. I have not seen any soft brick. We had an old hand at the inspection. If he spied any soft brick he would not allow it to go in. In going around the building lately I haven't seen any brick that was weathered at all anywhere.

The interior columns were of cast iron, and the beams and girders were of steel, and the trusses also steel. As far as I know all of the structural members of that building that are metal, with the exception of the columns, are steel, because they came from the Homestead Mill, which at that time had been turned over to Bessemer steel production, and the year after that nearly all of the mills in the east followed the suit of the Carnegie mill, in changing from wrought iron mills into steel mills. That is just my inference. I never examined as to that fact myself. I didn't examine the steel, only I know that it came from the mill, and the mill had been changed 733 into Bessemer steel manufacture. I had nothing to do with the placing of the order for the metal work, any more than Mr. Adler sent me down there to see whether the Snead Iron Works was able to carry out the work. They had the general contract for the steel, and steel was made at the Carnegie Steel Company, through the Snead Iron Works, and the Snead Iron Works made all the iron castings. They were cast in Louisville and sent up here. At the time of the drawing of the plans for the columns, we used the then best known engineering formulae in determining the size of those columns; they were all checked and rechecked by the different engineers. When we sent the drawings out into the shop,

there were again shop drawings made under Mr. Strobel and Mr. Marburg of the trusses, and they changed somewhat the details we had made, because they used the shapes and the numbers that best fitted to their shop methods, and all these drawings were redrawn. They had the strain diagrams and the load given to them, and before they would put any work in Mr. Adler again checked them and put his name on them. He was an engineer himself. The plans did not call for water to be in any of the columns. Of course, in erecting the column, the column is open on top and, of course, it can rain into it. I don't know of any other water that can get into there. In the preparation of the plans for the building, there was consideration to settlement given. The exact number of inches or feet was not taken, nor any unit of measurement as to how much it would settle. We did not make an exact allowance on it, but from experience Mr. Adler told me it
734 might settle four or even more inches, and we had put in some screws in the bottom of all the light columns, under the sidewalk as well as under the center of the first floor of the hotel. They were put under the columns with a thread, so they could be screwed out, and if I remember, they were six inches long, so you could screw them six inches. Those were the sidewalk columns, all light columns.

As regards balancing the live load and dead load, the structure, the ten story structure, was figured with 90 per cent in the top story, and reduced by 10 per cent as we went down, so in reality we had about 50 per cent of all the live load figured on the outside walls. On the interior of the theatre we had a little less than one-half, but it was still too much. And, furthermore, we figured the public parts of the building. It took some time for Mr. Adler, before he informed us what we could use, and he finally told us to use 75 pounds for all the public rooms for the live load, while in the hotel and office building 50 pounds was used. Now, that resulted in a heavier live load on the columns on the interior of the auditorium than there ought to have been there, and that was one of the things Mr. Adler was always sorry about, and in after years he watched the building, and said to his regret that the rest of it went down and the inside of the theatre stood, and he, of course, was very careful that anything that would wrench or crack he would change and rectify; and about two months before he died he called me down to see
735 whether I would not be willing to take a contract to cut the columns off—that is, in the auditorium only—cut

them off, each one of them, as much as they stood up, and lower them down so as to make the auditorium floor level again. But, of course, he died shortly afterwards and I paid no more attention to that. Now, that auditorium stayed up on account of too much live load being allowed on the foundations, and the foundations being small, the circumference of the piers has more shoring in the ground than the rest of it. About everywhere else, on Wabash Avenue and on Congress Street and on Michigan Avenue, the interior columns have hardly any perceptible difference between the outside walls. I have lately gone through the building from top to bottom, everywhere, and can hardly find any great variations in the levels in the floors in the outer portion of the Auditorium building; I mean in the hotel or office building; while, of course, the auditorium has that settlement across the foyers, and of course it is visible to everybody, and the last time I heard of the levels taken it was about 20 inches. The settlement of the outside walls of the building has been fairly uniform, although the extreme from one year, from the highest year to the lowest, is about eight inches while the adjoining piers is nowhere more than three inches, while in the auditorium that is entirely different. In the auditorium the settlement was much more. I dare say the first row of col-
736 umns to the heavy brick walls is as much as a foot, if not more, in the levels, and that is where the brackets and struts were all broken, on account of the additional strain that was put on them through this settlement of the heavy walls.

We figured this heavy live load, principally on the interior foundations for the columns that were to be inside the theatre. Those are the ones that are still up. Take, for instance, an auditorium having 4,000 seats, and take the weight of 4,000 people on that foundation with the square area we have there, it doesn't even come to 40 pounds if it was filled continuously.

Those jacks were put under the sidewalk columns and the columns supporting the first floor on Congress Street. There is no interior columns going to the top of the building except on the northern part of Wabash Avenue, the two columns in the tower and then the columns on Michigan Avenue. Congress Street has no interior columns except in the basement supporting the first floor. These columns that appear on Plaintiff's Exhibit 57, which were testified to having jacks under them would be the columns in the basement under the first floor along Congress Street. The load on these columns is just that one floor. There are no columns that go higher,

setting on top of these and going right on up. There isn't enough load on that. For that reason they put these jack screws on the bottom. The span on the second floor is taken care of by the girders running from the auditorium wall to the front wall. As to the span on each side of the column
shown in this picture, that column with the jack under it
737 is adequate to support that one floor. The columns under
the sidewalk on that support are about 8 feet. In those days they used the cast iron members. Every eight feet is one of these little columns. This column on Plaintiff's Exhixit 57 could be taken out without endangering the structure of the building, the roof shored up and another column put in there, but why should the column be taken out? It could be done. You would have to shore up the weight of only one floor. It isn't necessary to do that now. They can fireproof that column.

After the building was designed, there were some alterations in the construction or plans made whereby additional dead loads were put on the building. I am sorry to say that Adler & Sullivan were so solicitous of the opinions of others. They consulted Professor Ware as to the design, consulted professional men of all kinds, when working on the drawings. Professor Ware was Professor of Architecture in the School of Technology in Boston. He was called in to criticize the drawings, particularly two sets of drawings. One set was very ornate, made for terra cotta, very light, projecting bay windows, with iron columns from the second floor. It was all designed in detail. They then considered that was too frivolous or ornate, should be more of a monumental character. Then the design of stone was submitted to Professor Ware. He criticized the proportions of the tower and added two stories to the tower after the bottom course of the tower foundation
was already in. We changed the brick walls into hollow
738 brick in order to reduce that additional weight, but the
mortar going into the hollows of the hollow brick didn't quite make it up. We put in the heaviest beams we could get then, 20 inches I think, extending them to the adjoining piers, front and rear. The object was to carry and spread the additional pressure that would be on the tower onto the adjoining piers and not make that settlement abrupt. I believe if those beams had not been put in the tower would have shown a separation from the rest of the walls to such an extent it would have been alarming, like the tower of the Board of Trade. The Board of Trade tower was leaning out and

separated from the rest of the walls so that it was ordered taken down by the City of Chicago. In the Auditorium that was prevented by having these beams and thereby spreading the load. In the early years after the building was put up the settlement in the tower was more than it is now. You could see it on the third story and on the sidewalk. By the late measurements of the settlements I know it has equalized itself more than years ago when I was familiar with it. I was away for a number of years in Japan.

After the construction was started, Mr. Southgate said he needed a banquet floor. The banquet hall was designed to go over the roof. It was projected after the footings were in. The additional load of the banquet hall, coming on the north wall, and the inside wall of the theatre, aggravated the heavier walls, and was also one of the reasons these walls went down more than on the inside of the theatre. Besides that, they decided a prominent building which at that time had already got notoriety, had to have a large organ. So 739 they designed it. But they had no room for it. We had to cut out a piece out of the north wall and project the floor out over the alley, and that whole organ chamber was hung with steel rods up to the bottom of those trusses, so as to keep the weight on the Auditorium Building and not on the Studebaker Building. I have not seen the bench mark, testified to by the witness A'Neals, but from his description I understood that the bench mark was in a line straight south from the rear wall of the Studebaker Building. That would bring it practically where this organ chamber was added. Then there were additions made to the dressing rooms over this alley east of the organ chamber. That was done some years after the entire building was completed. Then above these dressing rooms there was an extension of the Studebaker Building over onto the Auditorium Building. So, naturally, there is different loads coming up that were originally entirely unknown. The portion of the front of the hotel which hitches onto the Studebaker Building was put on cantilever foundations so as not to touch the Studebaker Building footings. The addition of the organ loft and dressing rooms, and the other various additions which are part of the Fine Arts Building or tower, added to the dead load on the foundations of the walls at these particular points. That is the only reason I could see why there should be additional setlement at Mr. A'Neals' bench mark for the last five years while all the rest of the building had practically stood dormant as far as

settlement is concerned. The recital hall was in the original design. These various additions to the original design added decidedly to the dead weight of the structure on the
740 foundation walls. They did not add weight on the structural members of the building such as the columns; almost entirely on the brick walls.

The walls surrounding the stage are continuous; nearly all the brick walls surrounding the building are continuous walls except the proscenium opening. In the middle of the stage the floor is entirely on hydraulic jacks. It floats on water contained in the cylinders. They are constructed after the patents of the Asphilia Iron Company of Vienna. Asphilia is a Greek word referring to the safety of foundation construction. There are only three theatres in the world today that can compare with the stage machinery of the Auditorium as to this method. In order to get that system into the ground, sinking of the stage floor 18 feet, there is a displacement there of 36 feet, and that had to be dug into the ground. While they were digging those 28 cisterns, we had a settlement around the outside tower wall of almost four inches during the six weeks while these cisterns were being put in. They were put in by Sooy Smith. Whether these methods were as efficient as nowadays, I don't know. Outside of the cylinders, and the squeezing in of the ground caused really the first settlement of the Auditorium. That was around the foundation. That took place before the building was up. It was really the first warning that we had softer ground to stand on that Mr. Adler originally thought. The stage machinery is entirely contained on these cylinders, where the beams go on the heavy brick walls, the whole floor is supported on the pistons. The beams where they into the wall were, of course, bent down in connection with the settlement.

The Auditorium Association has released those beams
741 and raised them up where they were in the wall. They have bolted new brackets on to make it level. I suppose the Auditorium Association did that work. I do not know anything about it, except I saw those brackets put on the columns. I have seen those brackets; who put them on I don't know. These pistons still work. I have seen them working there a few weeks ago. They operated so as to raise and lower the stage. I don't think they could get out of alignment. They stick 28 or 30 feet into the ground.

There are two stage curtains. The inner curtain is for ordinary performances, ordinary stage width. Then there

is a larger curtain for spectacular purposes, balls and concerts, 75 foot opening, decorated with plaster, and it weighs about 11 tons. That curtain is used. I saw it dipped day before yesterday. It still works.

The tower is on one big footing, bigger than this room, I think, all in one. The whole tower, interior columns and everything, sets on that raft, three layers of timbers, concrete and rails, and on top of it is the masonry. The beams are on either side into those piers. At the time it was built Mr. Adler was afraid this big footing of the tower would not have enough weight to press on the ground and the rest of the building would get its weight and settle, so pig iron and bricks were put on, almost the total amount of bricks that were necessary for the tower. The brick would then be used from the pile as it went up. That was in order to give the ground under the tower the benefit of the squeeze. That was all in anticipation that there would be settlement.

In the outside walls on Michigan Avenue and Congress
742 the granite in the second floor is the whole thickness as the piers. The walls above are Bedford stone with brick backing. Practically half of the pier is stone. That is true, generally speaking, all the way over the whole Auditorium. It was not made in the modern method of veneering stone on brick walls. The average is more than six inches for the facing. I would say about one-half the area of the piers is stone. The windows come fairly well in. The piers come back. The stone mullions in the arched openings between the window piers on Michigan Avenue go down to the third floor. On the third floor there are beams which carry the mullions, and the mullions themselves carry the floor that goes on them. In Defendant's Exhibits 6 and 8, which are pictures of the Michigan Avenue front and the Congress Street front of the building, it is these mullions, these stone piers in the middle of this big arch here (indicating). On Michigan Avenue, instead of these mullions being carried by that pier, that mullion goes all the way down here, under this floor are heavy beams, they carry all this work, the pier has only itself to carry. The granite lintels on the second floor were, of course, considered too long, and were bolted through with nuts on the bottom, through these cast irin beams. They are hung on the iron and do not support themselves. These granite columns on Michigan Avenue are supported on a keystone with those in the arch. Mr. Sullivan did not want to have any chance of that stone being cracked, so the columns

were drilled and a bolt put in and those columns are hanging on steel cantilevers. A calculation of the stress in the
743 piers on the Michigan Avenue front would not be accurate unless it took into consideration the load carried by the mullion columns.

When we calculated the stress on the banquet hall floor, we used only 75 pounds through all the public rooms. It took quite a while before Mr. Adler gave us orders to use 75 pounds. The standard used in those days was just a question of how much load we could get on it. If people get as close together as they can, they cannot make any more than 75 pounds. That was not any prescribed amount in the city code. We had to figure it out. If people stand close together they do not weigh more than 75 pounds. In a banquet hall you can't get anything like it unless there happens to be a panic. The average auditorium gives fully ten feet or more to each person, either in the theatre or in the banquet hall. A man would occupy about 4 or 4½ square feet of space sitting down in the seat, but there are the aisles and so on. If he weighs 200 pounds that would make a live load per foot of about 40 pounds. The ordinance now for a banquet hall live load is 100 pounds. That was not in force when we made these calculations for the Auditorium; that was a later edition. Naturally, I watched it every time I went to the Auditorium with Mr. Thielbar and Mr. Renwick to see what the condition of the building was, in reference to settlement and anything that would appear as necessary. Last week I went over the office building as well as the hotel, from the top clear down to the bottom, everywhere I could get into a room or get an
744 excuse for looking in, to look for any beam deflected enough to show cracks in the plaster. I have not been able to find a single place a beam was deflected in either the office building or the hotel building to such an extent that the plaster would crack under it. Even in the Auditorium Building where these props have been replaced, all the beams I could see, I sighted to the bottom of them, and I could not find a single deflected beam. The long girders on the second floor show a deflection, but not enough to crack the plaster, I did not see any broken brackets or lugs on the columns. I have seen broken struts. A big beam settles, it puts a wrenching motion on the cast iron struts which support the beams. Naturally, they are not designed for standing such a strain. They are only for vertical loading. These broken struts or broken lugs on the columns were in my opinion due to settle-

ment. I mean the heavy brick walls settled and these columns did not settle. There was quite a difference in level. There was a strain, and they had to break, being of cast iron. If they were of steel, they might have bent. Plaintiff's Exhibit 70 illustrates what I mean. Those are portions of those brackets. Yes, here is another one put in there. In the background of this picture is a crack. The wall is only a tile partition. I saw the crack. The wall is a separation from the tunnel going down into the seats, only a partition wall. It does not support any beams or girders. In my opinion the crack in that wall was caused by the settlement of these beams. This wall rests on the beams. It went down and had to crack. The beam is the beam running toward the
745 right hand side of the photograph as I hold it. As that settlement went down, it may have been as much as 15 or 16 inches between the column and the wall. That produced a wrenching motion and that had to crack. That part of the building needs to be watched as long as there is settlement, but if the settlement has stopped I do not look for anything more of that kind. Those cracks were caused by settlement. I did not see any signs of plastering or recent repairs to any members when I was over there during the last two months. I think the last decorating in the theatre was four or five years ago.

Fireproofing was in its infancy at the time the Auditorium was built. Mr. White, Mr. Beitler and Mr. Eichler, three manufacturers of that class of material, were almost always in consultation with Mr. Adler on new ways of doing one thing or another. The floors all through the office and hotel building have tile arches. The steel members are protected by tile, excepting as I said before the columns under the sidewalk on that one floor on Congress Street. All the level portions of the theatre have tile arches but the sloped portions of the theatre; it was considered very difficult at the time. The method of putting wire lath and plaster underneath was considered fire protection from below. The space between the seats and the ceiling below was originally used for a chamber for the foul air to be taken away from the auditorium. There was no access to that space excepting for the engineer of the house, no public admittance or storage or anything of that kind was supposed to be in there. No fire could possibly get started in there. I am referring to the
746 space which is shown in part on the photograph in evidence as Plaintiff's Exhibit 69. That is an elliptical ceil-

ing over the auditorium, where the ventilation comes off. These are electric lights (indicating), thrown on the ceiling. That is all wire lath and plaster and channel bars. Above this is a floor made of T-iron. Above that floor each member of the truss is individually fireproofed with tile. We would probably know better today how to do it than then. But the part below this floor and above the ceiling was considered protected from fire, and left unprotected with fireproofing.

That space is not used for anything at this time, except for the engineer to go in there and make alterations and replacements of electric lights or something connected with the ventilating system. These electric wirings could be put in metallic tubes as is done at the present time. I think it was done in advance of the engineering practices at that time. There wasn't any fireproofed theatre before the Auditorium. As far as the Auditorium was fireproofed, it was ahead of anything done in the City of Chicago.

I think all of the struts that were fractured or showed any signs of fracture have been taken care of. They have a very able man there who knows every nook and corner of that place.

I think we have seen the place shown in Plaintiff's Exhibit 59, on which Mr. Wade is pictured in the background. The flange at the bottom of the column could be fireproofed now. Half a pail of concrete would fix that. I don't know whether
747 the column with wings on it, shown in Plaintiff's Exhibit 63, was part of the original design of the building or not. I went from bottom to top of that column to see whether there was the least sign of any deflection or any settlement. I could not find the smallest crack in any of the plaster on any of the ten stories. The only thing I can see as to why it was put in was to lower the floor there and for some mysterious reason they put the wings on. The floor has been lowered at the base under the column. There is a line through the other floor.

In Plaintiff's Exhibit 54 I see the straight edge across the floor. The floor lays on the ground. This happens to be the north wall, a heavy wall, which supports the banquet hall and so on. That settled and the floor went with it. It would be possible to dig a little deeper down and make the clearance greater. If that was done wherever the floor is high and the clearance low, the piping or sewer system, if they lay in the floor, would have to be lowered also. It can be changed as far as the height is concerned.

Mr. Adler was reputed at that time to be about as well posted on acoustics as anybody. He had built a number of theatres and churches previous to the Auditorium. He built the Central Music Hall on State and Randolph Street. That was a very fine theatre for acoustics. The Auditorium was achieved by not having any plaster inside the ceiling projecting on the solid walls. This was 35 years ago and we did not have the modern facilities for lathing and furring and so on. We made use of the primitive method of driving spikes in
the wall and stretching wire, and then plastering
748 on that. There were openings in the back of the theatre,
on the stairs, and tunnels going into the theatre were left open to let the sound waves communicate with the floor above as well as the floor below. The result was that the Auditorium has been very successful as far as acoustics are concerned. You can hear in the last seat of the house almost as well as anywhere.

As to my experience in connection with caisson construction under existing buildings, and also in connection with the building of new buildings, I had the contract for the masonry on the first addition to Mandel Brothers' store. On State and Madison there was a tile foundation for the rest of the building, except that the north party wall had caissons. One of the caissons came under the accumulator for the elevators in the store, about 40 tons weight. That would travel up and down 25 or 30 feet with a pressure of 700 pounds to the square inch. Every once in a while when the elevators would go up that weight of 40 tons would come down with a bang upon the foundation. I had to put a caisson directly under that, under the supervision of Mr. Thielbar and Mr. Fox. It took me six weeks. It was about as dangerous a piece of work as I ever undertook in my life, to keep that weight from pounding down where these men were down below digging for that caisson. But we got through with it without accident or without stopping the elevators in the Mandel Brothers' store for an hour. The next difficult thing I had
to do was for the Brunswick-Balke-Collender Company.
749 I built an addition to their factory. They had me enlarge
the boiler room. One boiler came right in front of the chimney. The chimney is probably 120 or 130 feet high. The only way they could use the boiler was to make room for the shovelers and stokers to feed that boiler. I had to take the foundation out from under that chimney while it was in use, with burning boilers alongside of it. I also had to guar-

antee not to disturb the factory. I took the foundation out and put columns there so as to make room for the stokers. The chimney had smoke coming out of it all the time we were working on it. Another complicated job was the tower of the Holy Name Cathedral; and I have had other experience besides those mentioned. As to my opinion whether caissons can be put under the Chicago Auditorium Building at this time if it becomes necessary to do so, well, of course, you can do so many things I don't see why the Auditorium could not be handled. It requires, of course, a good deal of careful attention. You cannot say right off. You have to go through it and examine it. If you could take the loads down in the basement, you may have to put it up to the second story and take the loads out there. No simple operation. I have not examined it closely enough to see whether there are any impossible arrangements there, but I imagine they can be overcome if there are any difficulties. Yes, there is some way physically by which the levels of these columns in the theatre could be made level with the exterior walls. Mr. Adler's
750 scheme I think is feasible, and it would have been executed if he had been kept alive for a few months. When you enter the Auditorium foyer from the tower vestibule you go against the floor, which is the bow string. Naturally, the thousands of people who patronize the theatre continuously see the Auditorium has settled. Everybody knows it. Mr. Adler was very much interested that that should be changed. He wanted that floor level. He evolved an arrangement by which the columns would be sawed off on the bottom by using a horizontal steel saw and sawing off each column enough so that when lowered the floor would be level at that time with the settled Auditorium vestibule. He said to me, "Mueller, it seems that the Auditorium is getting to its home stretch." He meant the settlement was reduced, that he could undertake to lower that so that it would not have to be done over again. The sidewalks have been raised several times. He did not want to undertake the Auditorium until he thought the settlement had become about fixed on the main building. We would take off these pieces of the columns at the bottom in the basement. It would not be necessary, if we did that, to take out any of the columns on any of the higher floors. The auditorium is not connected with the rest of the building except as floor beams and girders go in. No heavy structural member is resting on those interior columns. By sawing this bottom column off, of course you would have to hold up the

whole weight of the Auditorium building. On each column you would take as much off as it stood above the level of the vestibule, and then lower it. I do not regard that as a necessary step to take in order to maintain the present sta-
751 bility of the building, but just to make the floor level. That was Mr. Adler's idea, not to keep watching these struts that were replaced. I don't know whether they were all replaced under Mr. Adler's orders, but I know he continuously watched that feature of it. That operation could be performed without endangering the structural life of the building. It is dangerous if you handle it without doing it correctly. If well done, there should be no danger then. The Auditorium Building was a substantial and solid fireproof building of brick, stone, iron, tile and such other fireproofing materials as were necessary and usual in fireproofing buildings in the City of Chicago at the time it was erected. Yes, in fact, so much so that the building was continuously visited by the younger and older architects. I do not believe there is anybody in the profession that did not watch and look after the Auditorium while we were building it. The purpose of making the grillage foundation of different widths was that that had to be according to the load on each individual pier, had to be different according to the load. They are all sorts of sizes, no uniformity about it.

Cross-Examination.

These people that went in and watched that Auditorium Bulding while it was being built, no, they were not apprehensive that the tower was going to go through to China. At the time when the building was being built no one knew there would be such a settlement as there was. The apprehension that the tower might go through to China arose when the load came on it, when the roof was on the building. I don't know whether there was a good deal of discussion after
752 the roof was on and before the building was finished as to whether that tower was going to go through to China. There might have been talk about it, yet. I did not hear it. I did hear discussion about the sinking of the tower and settlement of the building while we were loading it with the bricks. I didn't hear of any architects and engineers going to look at this building on account of the settlement; not that I know of. I have read the "Autobiography of an Idea," written by Louis H. Sullivan, of Adler & Sullivan.

Mr. Fisher here read from page 308 of said book as follows:

"The year 1880 may be set as the zero hour of an amazing expansion, for by that time the city had recovered from the shock of the panic of 1873. Manufacturing expanded with incredible rapidity, and the building industry took on an organizing definition. With the advance of land values, and a growing sense of financial stability, investors and promoters were at high feast. The tendency in commercial buildings was toward increasing stability, durability, and height, with ever bettering equipment. The telephone appeared, and electric lighting systems. Iron columns and girders were now encased in fireproofing materials. Hydraulic elevators came into established use, superseding those operating by steam or gas. Sanitary appliances kept pace with the rest.

"The essential scheme of construction, however, was that of solid masonry, enclosing-and-supporting walls. The 'Montauk' Block had reached the height of nine stories and was regarded with wonder. Then came the Auditorium Building with its immense mass of ten stories, its tower, weighing thirty million pounds, equivalent to twenty stories—a tower of solid masonry carried on a 'floating' foundation; a great raft 67 by 100 feet. Meanwhile Burnham and Root had prepared plans for a sixteen-story solid masonry office building, to be called the 'Monadnock.' As this was to be a big jump from nine stories, construction was postponed until it could be seen whether or not the Auditorium Tower until it could be seen whether or not the Auditorium Tower would go to China of its own free will."

The witness: Well, I think, Mr. Fisher, that at that time Mr. Sullivan speaks of what happened after the building was up and and before. I think the Monadnock was built
753 considerably after the Auditorium. I think it was 1890 that the Monadnock was built. The Auditorium, I think, was under roof in 1887. I think they were several years apart. Of course, the Auditorium tower settled the minute it was finished, we know that; but the way he applies it to the Monadnock block, that was after the building was up, and not before. The time they delayed about going on with the Monadnock building must have been before it was built, probably. I did say that people kept coming to the Auditorium, the architects and engineers, and visitors, and that they went in there to see it, a very remarkable structure. It might be they went in to see it in part to determine whether this float-

ing foundation scheme of construction was going to work out; that might be, if it was known that it was going down. It was not known when the building was being built.

They put the organ in after the foundation and walls were up considerably. The walls went up to the top of the organ chamber, practically up to the ceiling of the auditorium. In the rear where this organ chamber was put, the wall was nearly up. The rest of the building was higher. I should say two-thirds of the way up. I think if the organ was put in at that time, that is some explanation of why the back wall keeps settling in the past five or six years, because the Studebaker or Fine Arts Building was added on top of that afterwards. I said I thought the place where this bench mark
754 was was where they modified the construction of the rear of the Auditorium Building so as to put in the organ chamber. All those changes were made before 1890. I don't know exactly when the Studebaker addition was made. One of them, down below under the Studebaker building, used as dressing rooms, I know that was made a number of years after the building was completed, three or four or five years, maybe. It has been there thirty odd years. If those loads were put on the Auditorium Building at that point thirty odd years ago, I don't know how that explains why the building is sinking at the place where the bench marks were made. That may have some different loading up there now. There may be some other reason. I don't know of anything that has been added there in the past thirty years. I know they added the story on Michigan Avenue, which I didn't know about, too. As to why it is still going down there, one and a quarter inches within three or four years, it may be a section of that has not been compressed enough like it has been elsewhere. It might be the compression of different parts under this building has not gone far enough to stop the settling yet. I think the Auditorium and the Monadnock are both good examples of mason work. I think they represent the highest example of a type that has disappeared or is in the process of disappearing.

After a temporary adjournment of court, Mr. Washburn, of counsel for certain defendants, called upon Plaintiff in open court to produce originals and copies of all correspondence in its files, from its incorporation up to December
755 31, 1891, between it and Walter L. Peck, Clarence L. Peck, Ferdinand W. Peck, Francis Bartlett, William A. Slater, and Bryan Lathrop as the representative of said Bartlett

and Slater, or any other persons representing any of the parties aforenamed.

Mr. Fisher, of Counsel for Plaintiff, stated every effort had been made to find anything bearing on the controversy in the way of papers or correspondence, but that none had been found.

Mr. Washburn declared himself satisfied with that statement.

The examination of PAUL F. P. MUELLER, witness on behalf of the defendants was resumed.

They had a testing tank there for testing the ground in order to ascertain how much should be allowed for settlement. From that and other experience I was told to figure 2¼ tons per square foot of ground. As to how much that would settle, or how little, I had no knowledge. I don't know whether Mr. Adler made any computations as to how much or how little it would settle, but as far as I know, he gave the instructions for loading the ground 2¼ tons. There was no figure or computation made of which I have any knowledge by which it was undertaken to compute how much the building would settle. I heard Mr. Lichter testify that the instructions given to him were to allow for two inches in settlement. I have no information on that subject any more than that we allowed for additional settlement on account of the screws in the columns, which was six inches. The
756 only thing I know in addition to the instructions given to Mr. Lichter to allow two inches was or is that there were four screws put in which would have given a play of six inches in the working of the screws. I did attach some significance in my direct testimony to the fact that the building had settled comparatively little in the last ten years. It may be possible that the levels produced in evidence in this case show that building settled at some points in the last ten years more than the full two inches allowed by Mr. Lichter in putting in the foundations originally. I have seen the table levels introduced in evidence here. I have a blue print in my pocket, and have had it there for several weeks. My testimony has been in part prepared on the basis of that blue print. I have no knowledge except from that. I see Pier No. 7 on the blue print. The level of that pier in April, 1915 was 13.74 feet. In 1924, nine years later, the level of

that was 13.54. It sank two-tenths of a foot in those nine years, which would be something over 2 inches. Well, the 2 inches originally allowed for settlement was an upset above the grade. I don't know whether that could be called a complete settlement, because we had the screws for six inches. I have said Mr. Adler told me that the building might settle four or more inches. He meant that to be the total settlement in the building that would occur after it was constructed. At Pier 7 it started in 1887 at a level of 15.38 feet, and in 1912 it had got down to 13.74, a difference of about a foot and a half. In 1887 the level of Pier No. 7 was 15.38 feet, and its level in 1924, in the last column, was 13.54, a total settlement of 1.84 feet. It settled two-tenths in the last nine years.

757 In April, 1915 the level of Pier No. 16 was 13.32. In 1924 it was 13.22. It sank 1/10 of a foot, or one-half of the amount that pier No. 7 sank. In August, 1887, the level of Pier No. 16 was 15.45, and in 1924 it was 13.22, a total sinking in the whole period of the life of the building of 2.23 feet, or a little bit over 27 inches. Both piers settled with great irregularity, as compared with pier No. 16, both during the entire life of the building and during the last ten years of the building. Pier No. 16 settled less than pier No. 7 in the last ten years. It settled just half. In the entire life of the building it settled 27 inches against about 22 inches. In other words, it settled in its entire life 5 inches more than the other pier did. That is more than the four inches that Mr. Adler said the whole thing might settle, and it is within one inch of the total capacity of these screws or jacks that were put in the columns. There weren't any jacks put in that had a bigger possibility of spread or difference of settlement than six inches. The difference in settlement between the two piers was almost the same as the total settlement allowed for in the jacks or screws.

I said there was some extra weight put on the tower, and that they tried to make it up by using some lighter material, tile. It was carefully figured out at the time to determine what additional load was put on the tower foundation to see how much more it would take and how much the hollow brick would reduce it. We carefully figured out how much the additional height and other additions would impose on the foundation. Then a computation was made, showing

758 how much we could save in load by this change to tile.

I can't recall now what the net result was, but it was

almost balanced except for the mortar that would squeeze into the hollows of the hollow brick. That was an unknown quantity. It amounted to a substantial overload, I think. That overload, due to that mortar, is not in my opinion what caused that tower foundation to go down to the extent it did; it only caused the variation of the tower being lower than some other piers. It shows here that the tower settled about 8 inches more than the average of the other piers. It settled a good deal more than that average as between the tower and certain individual piers. I think that mortar that squeezed into these joints is what accounts for that 8 inches that the tower settled more than the average of the rest of the building. That was not only the mortar in the top of added stories; the hollow brick was used from down below, all the way up. We must have made a net saving in substituting hollow tile for the tile that had been figured. They were hollow. When we put the mortar in I shouldn't say that more than made up all the saving from substituting the hollow tile. The mortar didn't squeeze into the whole brick, only in the edges. The weight actually put on the tower foundation was figured for 2¼ tons. It was a little bit overloaded. They actually put on a little more than 2¼ tons. I couldn't say exactly how much. I doubt if it run it up to 3 tons. I would simply have to guess at it. I haven't
759 got those figures any more. I could not guess whether it increased it another half a ton or not. The weight of 2¼ tons in pounds would be 4500 pounds. The load allowed under the present building ordinance is 3500. My judgment is that the load actually put on the tower foundation was more than 4500 pounds per square foot, due to the mortar, and the present load that would be allowed on a foundation of that character, under the building ordinance, is 3500 pounds. The tower foundation of the Auditorium is not overloaded 50 per cent., as compared with the present allowance under the building code; it would be the difference between 35 and 45. I couldn't say just exactly what it is. It is something substantial. There was a substantial addition to the 4500 pounds per square foot actually put on that foundation, due to this mortar. I couldn't say whether it was increased 500 pounds; it might be. I haven't got those figures. It might have been 500 pounds. That would mean that the total weight would be 5,000 pounds per square foot. I said it was a substantial addition to the 4,500 pounds that was made, and that it might have been 500. I say it might have been, but

I can't say that it was. It was more than 100 pounds, between 200 and 500 I should say. That would made the load on the tower foundation 4700 pounds per square foot, and the load allowed by the present building ordinance is 3500 pounds. They allow more than 3500 on hard clay, but I assume this structure is on soft clay. It would be somewhere from 4700 to 5,000, which taking the minimum, is an overload of 1200 pounds per square foot, as compared with the
760 present ordinance, or something like 34 per cent. If it was 500 pounds, that would be an overload of 1500 pounds, or about 40 per cent. I have said that the result of this operation would, in my opinion, have been the sinking of the tower to such an extent that it would have broken away from the rest of the building if it had not been for the fact we put some steel beams down in the bottom of that foundation; I don't know that I can say that is the only thing that saved it. The walls might have spread it over without the beams. When the additional weight was put in other parts of the building, like the banquet hall, and the organ loft. there was not anything done to strengthen the foundations carrying those loads. I can't say how much overload added, but it was considerable. There was no addition made to take care of that extra load. I never had anything personally to do myself with any building in the City of Chicago that sank 28 inches after it was built. I had buildings 8 inches. That is about the most I had. That is anywhere in the world. I think the most in the City of Chicago is 4 inches.

I testified that these foundations had to go down so low below the grade because it was necessary to get a timber grillage below the general water level. It would have been better, from the point of view of structural stability, for the foundations to have been only down where they would rest on the blue clay, if we had found any, but I don't recollect there was any hard pan or clay found on the Auditorium site.
If there had been any of this blue clay or upper hard
761 pan, it would have been better if the foundations had rested on it. Yes, if the hard clay had been there. Ordinarily in Chicago you go down 10 to 15 feet from grade and then come to a level of blue clay or hard pan, but down there in that locality, I don't think you will find that hard clay.

I saw the foundations of the Monadnock go in. My recollection is they probably did not go more than 13 or 14 feet, and they rested on the blue clay or hard pan, on the upper

crust. That is the principal reason why this method of using steel beams, I-beams, for a grillage, was adopted in this city; it followed the Auditorium building in time. When the Auditorium building was built that method was not used. They didn't use timber. The only other timber foundation I know of in the City of Chicago is the Board of Trade Building. They discontinued putting in grillage on hard pan, blue clay, or any other kind of thing, in foundations of the large buildings in the City of Chicago immediately after the completion of the Chicago Auditorium building. They used piles and afterwards caissons for higher buildings. They discontinued that method for higher buildings.

The statement with respect to the Monadnock Building, that it was the first and last word of its kind; a great word in its day; but its day vanished almost overnight, leaving it to stand as a symbol, as a solitary monument, marking the high tide of masonry construction as applied to commercial structures,—well, that is Mr. Sullivan's language, and, of course, that is the language of literature and romance.
762 Substantially, I think it is correct.

Mr. Fisher read from Mr. Sullivan's book the following statement:

"Meanwhile the use of concrete and heavy construction was spreading, and the application of railroad iron to distribute concentrated loads on the foundations, the character of which became thereby radically changed from pyramids to flat affairs, thus liberating basement space; but this added basement space was of comparatively little value owing to deficiency in headroom due to the shallowness of the street sewers. Then joined in the flow an invention of English origin, an automatic pneumatic ejector, which rendered basement depths independent of sewer levels. But to get full value from this appliance, foundations would have to be carried much deeper, in new buildings. With heavy walls and gravity retaining walls, the operation would be hazardous and of doubtful value. It became evident that the very tall masonry office building was in its nature economically unfit as ground values rose steadily. Not only did its thick walls entail loss of space and therefore revenue, but its unavoidably small window openings could not furnish the proper and desirable ratio of glass area to rentable floor area."

The witness: That is in the nature of evolution of the art of building. It is substantially correct.

Mr. Fisher continued from said book as follows:

"Thus arose a crisis, a seeming impasse. What was to be done? Architects made attempts at solutions by carrying the outer spans of floor loads on cast columns next to the masonry piers, but this method was of small avail, and of limited application as to height. The attempts, moreover, did not rest on any basis principle, therefore the squabblings as to priority are so much piffle. The problem of the tall office building had not been solved, because the solution had not been sought within the problem itself—within its inherent nature."

The witness: Oh, of course, when this was written, that was a retrospect of Mr. Sullivan's, between the time of the Auditorium and the present time. It correctly states the
763 situation that arose immediately following the erection of the Auditorium Building, and correctly describes the evolution of the art of building. I think that we all know it does correctly describe it.

Mr. Fisher continued reading from the same volume as follows:

"The Chicago activity in erecting high buildings finally attracted the attention of the local sales managers of Eastern rolling mills; and there engineers were set at work. The mills for some time past had been rolling those structural shapes that had long been in use in bridge work. Their own ground work thus was prepared. It was a matter of vision in salesmanship based upon engineering imagination and technique. Thus the idea of a steel frame which should carry all the load was tentatively presented to Chicago architects. The passion to sell is the impelling power in American life. Manufacturing is subsidiary and adventitious. But selling must be based on a semblance of service—the satisfaction of a need. The need was there, the capacity to satisfy was there, but contact was not there. Then came the flash of imagination which saw the single thing. The trick was turned; and there swiftly came into being something new under the sun. For the true steel-frame structure stands unique in the flowing of man's capacity to satisfy his needs through the exercise of his natural powers."

The witness: That is pretty nearly the same flowing language, but correct. And in connection with this, I might say that some of these first engineers were employed on the Auditorium. There was Mr. Stobel and there was Mr. Marburg, the Keystone Bridge Company. They handled the

trusses. These men belong to the class of gentlemen who subsequently saw this vision of steel structure, and they have helped solve it. When the Auditorium was built, of course, we had masonry walls. We have a skeleton wall in the court of the hotel. The south wall of the court in the hotel is
764 the skeleton wall. I would not compare that with what is called the modern steel construction, but it is a stepping stone to it. And we had some steel beams down under the tower, and used a few steel beams in the building. My recollection is the Auditorium was one of the first buildings that got the steel from the Homestead Mills that was changed over, so that it is now making Bessemer steel. Formerly it had been making wrought iron. As to what the beams it furnished to the Auditorium building were in fact, I do know that at one time a channel fell down on the floor or the ground, instead of going down on the skids, as it usually did, and that channel cracked. That would not have happened if it was wrought iron, so that particular channel must have been of steel. Whether the beams generally used were steel can easily be ascertained. You couldn't turn a whole plant over into the making of steel and make wrought iron at the same time. It meant a complete revolution. We had to go down there. Mr. Adler had to go down there. We had a man down there to report on the continuance of the steel. I did not hear Mr. Renwick testify. If Mr. Renwick, having been there and watched it, said in his deposition that the beams in the Auditorium were wrought iron, that would not have anything to do with my opinion. I went to Mr. Strobel's office to find out and heard from his partner that the mill was changed in 1883, and after that all of the other mills followed suit. I do know Mr. Adler went down to Pittsburgh, we had other men to report on the process of rolling these beams, so as to get them into the building, and I do know the building was put up in a lopsided way, waiting
765 for these beams. I went to Mr. Strobel's office and tried to find out, and could not find out what was actually furnished to the Auditorium. Mr. Strobel was not there. I found out from his partner that the Homestead Mill had been changed to the manufacture of Bessemer steel. That was all I found out.

The load per square foot for the banquet hall was figured at 75 pounds. The present ordinance allows 100 pounds to the square foot as the bearing capacity of the beams and

columns. Some other cities require only 75. I don't think I know any of less.

Acoustics have been a matter of accident. For instance, the very noted acoustics in the Salt Lake City Tabernacle was an accident. When they put in the gallery, if that gallery had gone tight to the wall, that acoustic would have been spoiled, but it just happened by accident they kept away so as not to hit their head on the curved dome, and the acoustics remained the same as it was before. Nearly every theatre or hall that has such a cut off space shows very poor acoustics.

All the columns in the Auditorium are of cast iron. I don't think there are any steel columns. In the office and hotel the iron and steel columns and girders are fireproofed, except where the floors are level. The sloping portion of the theatre has beams only protected from underneath with lath and plaster. The steel columns and girders that are fireproofed are covered with porous terra cotta and plaster, excepting the small columns under the sidewalk and 766 under the first floor. I don't think any of the beams or girders are covered with concrete directly on the beam or girder. I doubt it, because it was previous to the days we used concrete fireproofing. We use it now. It is regarded as the better method when we have a concrete floor. Just lately in the Morrison Hotel they are using tile again. The use of concrete in the art of fireproofing was practically started at the Union Trust Building in St. Louis, which was built by Mr. Probst of the Probst Construction Company, of which Mr. Lichter and myself are members, and there with the fireproofing around the floor beams striking into the columns on the outside, it was always difficult to get the terra cotta to fit, and that was fireproofed with concrete. The fireproofing companies have generally taken advantage of that, and since then have almost invariably used concrete made of the remnants of broken tile, and the columns are quite frequently now fireproofed in that method. I should say that is advance in the art of fireproofing.

I should say that all of the beams, joists and roofing beams and joints are iron or steel. All of the constructional floors are arches of hollow tile or like materials excepting the balconies to the theatre. Those are just wood. All the partitions are of brick or hollow tile, as far as I know. There may be some temporary wooden partitions. The roof is of iron, brick or hollow tile. It is fireproof construction. There

are steel beams up there, too. Generally speaking, steel
767 would be included under the general term iron. Where they use steel instead of what is strictly called iron, I would regard that as a compliance with the terms of the lease from which you are reading.

Redirect Examination.

You use the word "iron"—steel belongs to the original word "iron." It is evolved from iron. There are companies that manufacture steel that still call themselves iron companies. This fireproofing of the columns and other foundations I have mentioned was done according to the best known building practices of the time at which the building was put up. There were no jackscrews put under any of the piers that I know of. There were jackscrews on the north wall, on the adjoining building, under the continuous wall, the party wall of the adjoining building. When I testified about pier 7 and pier 16, I did not mean to let the impression be that there were any jackscrews under those piers. The jackscrews under the columns under the sidewalk and those supporting one floor along on the Congress street side are all I know of.

Recross Examination.

That channel that fell on the ground and broke is the only one I recall, because I happened to see it, and Mr. Adler remarked, "That is the way all steel is sold us to be so
768 much strength, but give me wrought iron. That would not break like that." They had a man in Pittsburgh to look after the tests applied to those beams. He was supposed to test the material before it was rolled. I new knew any other case where a channel of steel broke under such circumstances.

769 HENRY J. BURT, a witness on behalf of the defendants, testified as follows:

Direct Examination.

My name is Henry J. Burt. I reside at Wheaton, Illinois. I am a structural engineer with the firm of Holabird & Roche.

I have been a structural engineer for 29 years. I received my technical training at the University of Illinois. I have been with Holabird & Roche since 1911. I had ten years experience with the American Bridge Company. With the American Bridge Company my work was designing structural steel work, and the selling of it; estimating of costs; and to some extent the supervision of erection. With Holabird & Roche, for several years my work was supervising the designing of building structural materials, and in the latter three or four years it has been in a consulting capacity on the structural design of buildings.

In 1914 I wrote a book on steel construction. I don't know that you could say it is a standard book used by structural engineers. I don't know to what extent it is used.

I first find that steel beams were listed by manufacturers,
for use in the construction of buildings about 1884. It
770 is my opinion that a 15 inch beam was the largest one
that was rolled up to about 1890; 1888. I have a record that 24-inch steel beams were rolled June 19, 1889 by the Carnegie, Phipps & Company. I get the information from a book called the "Chronology of Iron and Steel." I don't think it is very widely distributed; I had a good deal of difficulty in getting a copy of it. In 1888 the Carnegie, Phipps & Company rolled the 20-inch steel beams I mentioned. Steel I-beams are designated by the depth and the weight per lineal foot. They are not marked. If it is necessary to determine the weight of a beam I would have to measure it, the depth and width of flange, and the thickness of the web, and then, by comparison with the catalog, the weight would be ascertained. The catalogs covering the period of years show variation in the dimensions of the beams, without material change in weight. I have data which I have taken from the catalog of Carnegie, Phipps & Company, showing some of these variations. The figures that I have noted down were taken from the Carnegie Steel hand book of 1913, which shows a 10-inch 25-pound I-beam has a flange width of 4.64 inches. The web of the 10-inch 25-pound I-beams is .21 of an inch; the 10-inch 30-pound I-beams have a flange web of 4.805 inches, and a web thickness of .455. The catalog of Carnegie, Phipps & Company of 1892 gives a 10-inch I-beam
weighing 25.5 pounds; width of flange, 4.75 inches; thick-
771 ness of web, .432. The same catalog gives an I-beam
10 inches by 33 pounds, the width of flange 5 inches even, and the thickness of web, .37 of an inch. Between 1884 and

1895 the mills listed both steel and iron beams in their catalogs. In 1892 the lightest 10-inch steel beam that I found was 25.5 pounds. I find it in the catalog dated 1892 of the Carnegie, Phipps & Company. The heaviest in the same catalog was 10-inch by 33 pounds. The lightest iron beam, 10 inches, that I found in '92 was 30 pounds per lineal foot. The heaviest in the 1892 catalog was 32 pounds per lineal foot. The unit stress in vogue for steel back in 1886 and 1887 was 16,000 pounds per square inch. That same unit stress is still used in the building code of Chicago. The unit stress for iron in 1886 and 1887 was 12,000 pounds per square inch.

Deflection, as applied to a beam, means the bending of the beam from a straight line. It makes no difference whether the beam is in a horizontal or slanting position when you are calculating the deflection. Steel is an elastic material. It will bend under a small load. The bending is proportionate to the amount of the load up to certain limits. If a steel beam is used in a structure, loaded to its rated capacity, or we will say 16,000 pounds to the square inch, the deflection is such an appreciable amount that it can be measured by observation with a straight edge or a straight line. This
772 deflection first appears at the time of the application of the load. If you sighted along a beam that covers a 22-foot span and the beam was overloaded to the point where the deflection was apparent, you could see it with the naked eye. This unit stress of 16,000 pounds per square inch for structural steel is modified as to columns and riveted girders. This figure of 16,000 pounds was an arbitrary figure adopted by engineers after testing the material. 16,000 pounds does not represent the breaking strength; it is approximately one-fourth of the breaking strength. The current practice in testing a piece of steel for tensile strength, or rate the breaking point, is to cut a piece, I believe, two inches wide, and it is about 14 inches long. It is cut carefully to size as to width, and is calipered as to thickness, and marks put on it for measuring the elongation after the load is applied. Then it is inserted in a pulling machine that gradually applies the load. According to current specifications, it is required to come within the limits of 55 and 65 thousand pounds per square inch. I would call that the ultimate strength, then, of steel that is used for the purpose of 16,000 pounds for building. The old specifications that were in use back about 1890 recognize grades of steel, with reference to

their breaking strength. The figures on those taken from the catalog of Carnegie, Phipps & Company of 1892 are;
773 mild steel, with a breaking strength of 54,000 to 62,000 pounds per square inch; medium steel, from 60,000 to 68,000 pounds per square inch; and hard steel, 66,000 to 74,000 pounds per square inch. The specifications now generally used provide for 55,000 to 65,000 pounds per square inch. I have said that the standard of the building code is 16,000 pounds per square inch for actual usage, and I have told you that the breaking point of steel now runs in the neighborhood of 60,000. By that I do not mean that there is a margin of safety of 4 to 1.

The elastic limit is the point which develops in the testing of steel, where the strength ceases to be proportional to the load. Taking this member that we have been discussing, and considering the tensile test, this elastic limit is reached at approximately 30 to 40 thousand pounds. It is specified to be not less than one-half of the breaking strength. If a stress is applied equal to the elastic limits over a long period, or is repeated a number of times, it is apt to cause failure. I would say that the elastic limit is the actuality as distinguished from the so-called standard limit of strength of the beam for useful purposes. The margin of safety is approximately 2 to 1. The building code of Chicago requires floor tests, in concrete structures particularly, to be at double the rated capacity. That is to say, if a floor is to be rated at 100 pounds per square foot, the test load must be 100 pounds plus a duplicate of that, making another 100 pounds,
774 plus the weight of the floor.

There is a belief among engineers of repute that higher stresses can be used than 16,000 pounds. The organization of the structural steel manufacturers is advocating using a stress of 18,000 pounds per square inch. A committee of the American Society of Civil Engineers reported last January in favor of using 20,000 pounds per square inch. The usual value of the elastic limit of structural steel now is from 30,000 pounds upwards. According to the specifications, it could fall as low as 27,500. An increase, if adopted on the recommendation of the American Institute of Steel Construction, or the Committee of the American Society of Civil Engineers, of either 18,000 to 20,000 pounds would simply mean they are crawling up on the elastic limit. The specifications of 1885 to 1895 required the elastic limit to be not less than one-half of the breaking strength. Cast iron

columns may vary as to their thickness. It can occur either deliberately or accidentally in the process of manufacture, whereby the metal on one side would be thicker than the metal on the other side. Cast iron in columns is not as reliable a material as steel. Greater precautions are taken in the the use of cast iron columns than would be taken in the use of steel columns. That has always been true as far as my experience goes, since they have had both kinds of columns. My experience began in 1897. Using the standard of the Chicago Building Ordinance at the present time
775 in the use of cast iron columns, the normal margin is 10 to 1. The actual margin I can't state very definitely. I know of other building standards where the margin of 8 to 1 has been used. I prepared a table showing the safe load in pounds on four sizes of cast iron columns according to the building codes of the city of New York and the city of Chicago at various times on an assumed length of 12 feet.

776 In the first column to the left is the word "authority." The first word New York is followed by the date 1906. That means that the authority was taken from the building ordinance which bears the stamp of 1906 on the cover, and which I understand was in effect, however, from 1899 to 1917. The second New York, 1917, refers to the New York ordinance which bears date of 1917. Chicago, 1911, refers to a Chicago ordinance dated 1911, in effect since 1911. In the next column is the figure 7 by $\frac{1}{8}$ inches. 7 is the outside diameter of the cast iron column and $\frac{1}{8}$ is the thickness of the metal in the column. The next column shows 8 by $\frac{1}{8}$; 8 inches is the outside diameter of the column and $\frac{1}{8}$ the thickness of the metal. The next 9 inch diameter by 1 inch thick. The next, 12 inch diameter by 1 inch thick. The figures under these respective column sizes are the allowable load in pounds per minute on those columns according to these different authorities. Taking the first column, 7 inch diameter by $\frac{1}{8}$ inch thickness, the Chicago limit in 1911 was 103,000 pounds. New York shows 107,000 pounds in 1917. Then New York shows 156,500 pounds in 1906. It indicates as to the limit of the Chicago requirements what I know to be the case, that one is based on a normal factor of 10 and the other on a normal factor of 8. I mean by that—Chicago was 10 and New York 8 in 1906. Cast iron columns were extensively used in 1885 to 1890 in column work in large buildings but are not much used now. My opinion is that on account of

the large volume of that work done back in the nineties,
the work of the foundrymen in casting columns was more
777 dependable than it is now when a comparatively small
amount of it is done.

I have an opinion as to whether it is possible for a structural engineer to calculate definitely the stresses of structural members of an existing building which was erected and completed as much as 35 or 40 years ago without having before him either, first, definite detailed plans and specifications of the building as erected, which he knows was carried out in the erection of the building, and in which there has been no substantial change since erection; or, second, definite information gained by physical examination of the building consisting of exact ascertainments of the material used, the extent of the material, and complete information as to the scope and occupancy of the tributary area. My opinion is he could not figure it unless he knew what was there. The tributary area taken by such expert in making his computation might be inaccurate in the event it was shown he had not taken into consideration certain elements of construction now shown on the fragmentary plans and not revealed to him by his examination of the building. In designing buildings now, structural engineers of high standing sometimes intentionally provide for beams which might be slightly overstressed. One case that I can cite, is that during the war on account of the scarcity of steel, certain war work was deliberately designed
on a basis of 20,000 pounds per square inch. In the regu-
778 lar designing of buildings it is not unusual, and I think
it is considered good practice to use a certain size of beam if it fits the situation, even though it might be overstressed 5 or 6 per cent. In other words, if you had a load of 47 or 48 hundred pounds you might use a beam that would not quite exactly fit that number of hundred pounds. I do not mean to say it would be done throughout the whole building. The typical situation would be in a floor where the beams were generally of a certain depth. In order to maintain that certain depth it might be necessary to overstress some of them slightly. If you wanted to keep the thickness of the floor over a considerable space you might use the same beams even though one were slightly overstressed.

(The table identified by the witness was offered and received in evidence and marked Defendants' Exhibit 14, and is in the following words and figures, to wit:)

779 Table Showing the Safe Load in Pounds on Certain Sizes of Cast Iron Columns According to New York and Chicago Building Codes. Assumed Length 12 Feet.

Authority	Date	7″ x ⅝″	8″ x ⅝″	9″ x 1″	12″ x 1″
New York	1906	156,500	188,000	246,000	353,000
New York	1917	107,000	132,000	175,000	261,000
Chicago	1911	103,000	130,000	175,000	270,000

780 *Cross-Examination.*

The table doesn't give information as to the factory of safety, in New York, in 1917, for the smallest type of columns shown in that table. New York changed from 1906 to 1917 by cutting down the allowable load approximately one-third. That one-third, that 107,000 pounds, indicates to me that it is based on a given factor of safety because I know the formula from which it is figured. It is substantially the same as formula used in the Chicago allowance of 103,000 pounds. The ordinances do not give the values with the same degree of refinement. That is also true of the next column, the eight inch cast iron columns. So that the 132,000 pounds in New York and 130,000 pounds in Chicago now are substantially the same. When we get to the 12 inch column, New York is 9,000 pounds less than Chicago as to the allowable load. The two figures, in New York and Chicago, respectively, were arrived at by substantially the same formulae. The purpose in all these cases is to provide for what is regarded in engineering practice as the proper amount of loading. My opinion is that cast iron columns are not so carefully cast now as they were forty years ago. I have had occasion to bore a good many cast iron columns, but I can't say that any of those were columns that were cast back prior to 1890. The fact that there is an irregular thickness of metal in a cast iron column affects its strength. It weakens it, not merely be-

781 cause of the difference in the thickness of the metal itself, there being less metal on one side, but because it gives an unequal strain on the column. Steel beams are beams now tested at the mills with very great case, not as individual beams but as part of the metal used in the casting of any one load of individual beams. The methods now in vogue were not so generally applied at the time I first had any experience with this subject. There has been a very great increase in the practice of testing. I think some indi-

vidual mill might have used nearly as thorough methods in 1897. That is based just on general information. This limit of elasticity to which I have referred means that a beam may bend to a certain degree which is fixed as the limit of elasticity, because if it bends beyond that the beam will not return to its normal straight or level position. When you get beyond this limit of elasticity the beam may still bend but it won't go back the entire distance. Individual beams will vary as to the extent to which they do go back.

I expressed an opinion as to what an engineer might do from information in his possession. The greater the definiteness of his data the greater the definiteness of his conclusion. The rolled steel beams are sufficiently accurate as to uniform thickness of metal so that they are accepted as being uniform. As a matter of fact, for all purposes of an engineering computation it is sufficient if you know the style and
782 size of the beam as catalogued. You need to know in connection with that whether any portions of it are cut away. But if you assumed that the beam was in its natural or normal condition, you would have all the data you would need to have about that beam if you knew its size as it was listed in the specifications.

I was asked whether in beam 22 feet long and loaded to its rated capacity, I could see the deflection by sighting along it. I can't answer you definitely, but a 12 inch beam 22 feet long and loaded to capacity would deflect approximately ½ inch at the point of greatest deflection. A half inch would not be discovered in such a beam if the beam was plastered and in place.

783 FREDERICK J. THIELBAR, a witness on behalf of defendants, testified as follows:

Direct Examination.

I reside at River Forest, Illinois. I am an architect. I have been following that profession since 1892, always in Chicago. I received my technical training at the University of Illinois. I started the practice of my profession in Chicago in 1892 with Holabird & Roche. I was superintendent of construction from 1892 until about the year 1900. From 1900 until 1912 I was general superintendent in charge of the construction of the firm. About 1912 I was made manager, and

I served as manager until I think about 1918 or 1919. Since then I have been associated with Holabird & Roche on special work until recently, and now I am in business for myself in the practice of architecture, the firm being Thielbar & Fugard.

The names of some of the buildings on which I have had experience as an architect in Chicago are: two sections of the Congress hotel; the McCormick building; the Monroe building; University Club; Powers building, now the Champlain Building, on Wabash Avenue; the inner building of Mandel Brothers on State Street; the two State street sections of Mandel Brothers; the Champlain Building, which was wrecked to make way for the Boston Store; the various sec-
tions of the Boston Store; Chicago Savings Bank Build-
784 ing, opposite the Boston Store; the North American
Building, the Republic Building; various sections of Maurice L. Rotschild's buildings; the Davis Department Store Buildings; Hotel Sherman; the Cook County Court House; Chicago City Hall; Chicago Temple; Main Telephone Exchange; Franklin Telephone Exchange; LaSalle Hotel; Otis Building; Lumber Exchange; Fort Dearborn Hotel; Wabash Exchange; Hart, Schaffner & Marx, and a number of other buildings, and also important buildings outside of the city.

I have made some specialization of inspections and examinations of existing buildings for the purpose of ascertaining their conditions as to safety, stability and endurance. The specialization covered a period of twenty years, from 1892 until 1912, and then I have made many examination since. I have made an inspection or examination of the Chicago Auditorium Building for the purpose of ascertaining its condition at the present time with reference to its safety, stability and endurance. I was with Mr. Renwick and Mr. Paul Mueller in the building on April 2, 1925. I have been there since that time, particularly last week with Mr. Mueller and in conference with Mr. Parker who testified here, and others. I have also heard or read, I believe, the testimony of Mr. Fox, Mr. Ritter, Mr. Parker, Mr. Lichter and others in this case.

There are piers on three sides of the building. These are
not made of ordinary rubble masonry. The piers under
785 the street walls are made of carefully cut dimension stone.
Rubble masonry is made up of a considerable number of pieces of stone, probably blasted out of a quarry and delivered to the building without any preparation, all irregular in shape. A dimension stone is a stone of practically a uni-

form size and usually in large blocks. A dimension stone of the character of the piers that I observed are cut stone, they have been cut with tools to a definite surface so that the mortar joints between them are thin and uniform. A through stone is a stone that covers the entire surface of the pier. Plaintiff's Exhibit 51 shows masonry typical of the footings of the piers that I saw in the Auditorium. Those are dimension stones here. They are not dressed dimension stones but they are dimension stones, and typical of it. That kind of masonry is used to a certain extent in bridge construction. The bridge piers are usually made of another kind of dressed stones, the other kind which I have just described. A masonry construction using dressed dimension stone is very much stronger than masonry construction of the ordinary rubble. The quality of the masonry work I saw generally throughout the building was very fine in my opinion. I examined the mortar and the cement in quite a number of locations in the piers and in the walls, and all the mortar, I believe, that I saw I considered first class. I examined those samples that were produced in evidence here. I consider that good mortar. The fact that in taking out the piece of mortar from the wall a piece of brick came with it would indicate that the mortar is as strong as the brick.

786 The columns shown in Plaintiff's Exhibit 57 are in the kitchen, underneath the main dining room, supporting one floor load only, that is, on the floors above there are girders which span the space over the dining room, leaving the columns in question to support only one floor load of the dining room above. The total height of that column itself, reaching from the pier to the very top of all the members of the column, is just one floor. As I recall, the only column not fireproofed were these columns and the columns under the sidewalk supporting the sidewalk load only. Those particular columns could be fireproofed at this time in compliance with the Building Code of the City of Chicago—not necessarily an expensive job. It would not add any appreciable amount of dead weight upon the load of the structural members of the building except the piers and the foundations upon which they rest. As I recall, the columns in question had jacks under them, the columns in the exhibit and the columns under the sidewalk. The columns under the sidewalk support nothing besides the sidewalk. Those jacks could be taken out without shoring up any weight except the floor as to the particular columns in the exhibit and

the sidewalk as to the others. That would not be a particularly difficult or expensive job. While in the building last week in company with Mr. Parker I had him point out to me the two columns concerning which he testified as to stresses and overstresses. I examined those columns and the
787 surroundings. Neither of the columns are typical columns; taking for instance the column in Wabash Avenue, that is at the north end of the building. It is a column supporting largely the stairs and the stair loads. There are stairs running up on either side for most of the height of the column. A typical column is one which supports floor loads. It is a unique column, that is, there isn't another one like it. The requirements, the city ordinance requires a live load of 100 pounds on stair construction, but that is a requirement since about the year 1910. That is a requirement that I don't know anything—I don't know whether it is called for in any other city ordinance or not, but it is a peculiarity of the city ordinance of Chicago since 1910. Prior to that time the city allowed a regular floor loading on stairs, that is in an office building. The applied load is specified at 50 pounds per square foot. Prior to 1910 we would figure 50 pounds per square foot on the stairs. After the date of this ordinance we would have to figure it 100 pounds. Now that fact shows that as far as making the figures on the column is concerned, making the estimates as to the strength of the column, you could absolutely make no comparison with the other columns at all because there have been no changes in the ordinances as far as the regular loading is concerned. Prior to 1910 the regular loading was 50 pounds. Since 1910 the regular loading is 50 pounds. The load on stairs, live load on stairs, prior to 1910, was 50 pounds, and after the 1910 ordinance it
788 was 100 pounds. Consequently, you can't make any comparison. The column I looked at, that is alongside the stairs, the stairs on one side. That would apply to the other column as well, that is, the load. It isn't a typical column in any sense of the word. I did not detect any signs of failure. I examined it particularly for that purpose. Cast iron columns have been used in the construction of large buildings until a comparatively recent time. It has some advantages over the use of steel in columns. It is more fireproof, known as a more fireproof material, than steel. Then, another thing, it is also a more permanent material unprotected than steel, that is, a cast iron column in a building is practically indestructible as far as corrosion is concerned, but a steel column

is not. I recall that the evidence which shows that in the construction of the Auditorium building the girders were attached to the columns by resting on lugs and then were bolted on. I have seen some of those typical places. I recall that the evidence shows it is customary in attaching girders to columns which are made of steel to rivet them on and give greater rigidity. In my opinion in the Auditorium building there was an advantage in the use of columns to which the beams were bolted rather than riveted as at present. Due to the unequal settlement there is more play in a connection, column connection, of a steel beam to a cast iron column than there would be with a steel beam connected to a steel column. There would be more play, allowing more action than you would have with the steel column with the steel beam at-
789 tached to it. As an inspector of old buildings I have ascertained that beams and girders will show a deflection under an overstress. I examined beams and girders in the Auditorium such as I was able to see for the purpose of determining whether or not there was such deflection. I couldn't find any deflection anywhere. On the other hand, I found a great many of the beams showed an inclination upward rather than downward. That was due to the plaster, but it showed since the plastering had been applied there had been no deflection whatever. When they plaster, a good plasterer tries to make something of a crown rather than a straight line. A beam deflects but if the deflection would be sufficient, it would creek the plaster. The longest span I examined, the spans along Wabash Avenue, I think are 30 feet or more. I didn't measure them but they are long spans, that is, the channels run parallel to the Congress street wall, with a long span, I should say it was around 30 feet, might be 32 feet, didn't measure it. I was not able to detect any deflection there. In examining the building I found that two holes had been cut to show the thickness or nature of the materials forming the loads in the fireproofing on the line of columns along the stairs in Wabash Avenue, in the Wabash Avenue pier of columns, but I didn't find any other that I recall.

I saw the wood that has been testified to as being in the theatre. That is used for the floor material in the offsets
790 of the balcony. The balconies incline upwards and you have a series of steps, risers, as you might say, on which the opera chairs are supported. Now, the material, the flooring material, is wood three inches thick supported, it is supported on fireproof material, that is, the horizontal portion

only. The vertical riser is made of sheet iron. This wood that is used in what we call mill construction, it is approximately 3 inches thick. In my opinion 100,000 feet of that lumber is not an unusual of excessive amount of wood to have in a modern fireproof building. The fact is we use wood in all the buildings. The Chicago Temple is the last large building I had to do with. The floors throughout are, that is, in the office floors, are wood floors resting on wooden sleepers. The window frames are wood and the doors are wood. The fact is there is a great deal of wood permissible under the Chicago ordinance. It doesn't disqualify a building as a fireproof building simply because certain details may be wood. Mill construction would be superior to construction that was not mill construction. The bottom of these offsets invariably are protected with a fireproofing material underneath; that is, this lower surface is not exposed. You will find some sort of dead space made by a fireproof material underneath.

In Plaintiff's Exhibit 61, a photograph taken under the balcony, this is protection here. I am pointing to the channel bars and wire lath and plaster underneath suspended with these rods. That is not an occupied space. It is not
791 made to travel over and it is not made to occupy. That is a suspension rod, but this is a conduit here (indicating.) We would call that a dead air space, yes. I would classify the Chicago Auditorium Building a fireproof building.

This wood could not very likely be replaced with cement or some similar material. It may be at that. I couldn't say. It might be replaced with a rough steel, checkered plate, upon which the people would not slip. That would add somewhat to the dead load of the balcony. I wouldn't say offhand that if you added to the dead load of the balcony you would have to change the columns under the balcony. To take the columns out, just under the balcony, that would not help you any.

I have had direct contact with not less than forty caisson operations, different projects—all in Chicago. I have had experience in putting caissons under existing buildings with floating foundations. I had had experience in caisson work where I was putting up a new building, about forty different contracts. I have had experience in the observation of buildings close to places where caisson jobs were being put down to watch the element of safety and stability of the old buildings. The caissons nearest to the Auditorium that I have had experience with are the first section of the Congress hotel,

immediately south of the old Auditorium Annex. That was approximately 200 or 225 feet from the south wall of the Auditorium. I don't know of any closer job, unless the McCormick Building is. I had charge of that. I do not
792 think that is as close. I paid close attention to the detail construction, caisson construction, under the Congress hotel. I think that I traveled up and down most of the caissons. I spent a great deal of my time going up and down the caissons on that particular job. I was there frequently night and day. I had a room in the hotel.

Speaking of the soil, I found construction work under the Congress Hotel, from a point we call blue clay, that is where blue clay begins, on the top there is always a stratum of more or less loose material; about 14 feet below street level we get what we call blue clay, and from that point on down to about 75 feet below street I should say we have a uniform plastic clay. It is a wet material something like putty. From that point on we still had clay but we got a stratum of torpedo sand. That is about, I should say, about 80 feet down below the street, we struck a stratum of somewhere from 4 to 6 inches deep of torpedo sand that was wet. It was water-bearing stratum. In my judgment and the others, that had to do with it, that was lake water. The fact that I found water as I have described did not lead me to discover any additional settlement under the part of the building which was not on caissons. My general experience and observation as to the effect of water encountered in caisson construction on the foundations of nearby buildings on floating foundations or otherwise is, that we encounter water in two places, the first, surface
793 water, the upper stratum above the blue clay which I have described, which varies in depth from 13 to 14 feet below the street, which is water bearing, an impervious stratum, through which the water drains. If the foundation of a building rests on that upper stratum and we cut through it, it settles very rapidly. I have had a great many instances of that. We encounter some of our worst cases of settlement near the surface on account of this surface water and buildings being constructed on top of this impervious material. But when we get to 14 feet or the blue clay level, what we call the blue clay level, I do not recall of any water, getting any water until we get to the place we call hard pan, and usually the water is underneath the hard pan or from the hard pan level down. I have never been able to establish any relation between the water we encountered and the settlements that may

have taken place in adjoining buildings, and I have endeavored a great many times to see if I could not establish a relation. The Tribune caissons rest on hard pan. Some of those are called bell caissons. They go about 75 or 80 feet. That is a guess, but I recall for the Boston Store we determined to go to rock. We had wet caissons as we cut through hard pan. We never could find that the Tribune had been affected in any way. The levels taken on the Tribune didn't show any settlement whatever. That is across the street. In all my forty caisson jobs, I do not know of any building that was across a street of ordinary width that had to be protected while I was putting down caissons. I have never observed any set-
tlement of any building caused by the drainage of water
794 on this lower level. The instance I give of the Boston
Store and the Tribune Building is a specific instance of
it.

As to the deterioration of wood used in foundations, I have encountered old piles in the excavating of caissons, and I have never found a case of deterioration of wood. Then I recall another specific instance. The first section of the Mandel building at Madison and Wabash is supported on wooden piles.

An extension, an addition was built on this Mandel building, with caisson foundations and with a sub-basement, and with the sub-basement extending probably thirty feet below the tops of the piles, 25 to 30 feet, I do not recall which, but it is a material distance. Our retaining walls were on the line of the two properties, between the property on piles and the property extending to the lower depth. I have never known of anything to happen there. Apparently the building is in good condition notwithstanding the fact twenty years ago we dug right down beside that building on piles.

The theory of caissons has not advanced within the last ten or twelve years, but when the caisson construction started everybody had to learn the business, that is, we had to learn how to excavate these caissons and do the work properly. That applied not only to the superintendants and engineers and leaders involved, but to the individual workmen. Caisson construction now has become a trade. A caisson digger is a
caisson digger the same as a carpenter is a carpenter.
795 They know a great deal more about it and consequently
we have a great deal less to watch than 15 or 20 years ago, because we all know a good deal more about it. We know how to do this digging more carefully. The difficulty about

putting caissons under an existing building is more the ability to hold up the old building while doing it than digging the hole. I should say a week is an average time from the time we start with the caisson, topping out, until the concrete is in the caisson. It would run about one week in the average case. We dig a circular hole down in the ground. The sides of the hole are held with a material called lagging, wooden strips like staves held in place with steel rings. Then we frequently use wooden bracing in addition, called bulkheads. A large percentage of the success of digging a caisson with the minimum damage to adjoining property is in the careful excavating to the caisson so that there are no voids back of the lagging. In other words, so that the caisson is as near—that is, so that the diameter of the earth is essentially the diameter of the back of the lagging. I put the caissons under the Congress about 1907. There is less likelihood of settlement in my opinion now in caisson work than there was, say, ten or fifteen years ago, on account of more perfect workmanship and supervision.

I would say that a provision for wind pressure in the Auditorium would be unnecessary on account of its height and on account of its great spread, on account of its large area and the fact that a number of heavy masonry walls were used in the construction. The usual practice of builders when they are undertaking underground construction with
796 reference to their care and foresight as to adjoining property is that adjoining properties, immediately adjoining, have to be supported, sometimes by the builder and sometimes by the owner of the adjoining property. Practically in every instance that I recall that was done.

I examined the fractures of various struts and connections in the framework of the Auditorium building while I was over there. I found they had been repaired. I considered the repairs made sufficient to carry the load. It is an uncommon occurrence in Chicago to make similar repairs to old buildings. I don't recall that it has been done before, to my knowledge. My opinion is that the levels of interior columns could be made level with the exterior walls; I refer now particularly to the columns across the foyer of the theatre as being typical. The columns there could be lowered and it is possible that the beams along where they rest on the columns, walls, or the tower walls or tower construction, could be raised up. I would have to look into that, but that particular thing has been done.

I have an opinion as to whether or not the Chicago Auditorium Building was a substantial and solid fireproof building of brick, stone, iron, tile and such other fireproof materials as were necessary and usual in fireproof buildings in the City of Chicago in the years 1887 to 1890. My opinion is that the workmanship, the workmanship and materials used, that the Auditorium generally is an exceptional building. I
797 have examined hundreds of buildings, and I regard the Auditorium as one of the best, as far as workmanship and material is concerned.

In the construction, the construction has every indication of being a stable building. Instead of being overstressed generally I think it is the other way. The floor construction especially has the appearance of being decidedly conservative.

There is just one characteristic of the settlement of the building. In my judgment, that is essentially a thing of the past. That is, my experience with other buildings leads me to say that the settlement, additional settlement, if there is any, will be of a negligible quantity. That fact leads me also to believe that the soil under the Auditorium is in a much better condition to support the building now than it was before.

The load on the soil and the superimposed weight, the weight of the building on the soil has compressed the soil and given the soil a resistance that it did not possess before. In other words, a sort of balance has been established between the superimposed weight and the soil underneath, so that I am satisfied that the settlement is a thing of the past, and that as far as the foundations are concerned they are in better shape than they have been, as a whole. There might be some instances here and there where there has been some damage done but, generally, as a whole and in a general way. I think that when this settlement occurred, which the evidence shows was for the greater part in the first few years of the
798 building, there was a severe wrenching of the structural parts of the building caused by the settlement and the distortion. It is difficult to determine just what those stresses are when a building settles, but I should say that this unequal settlement acted as a very severe strain on the various members of the building, including the columns, especially in the columns and walls, and whatever speculation there might be in regard to the strength of the columns especially would be removed by the experience that the building

has been through. The distortion that the building had, by reason of the settlement, would be conclusive or persuasive itself of the strength of the construction, taking also into consideration that the building has been standing there forty years. You have got to give a value to that.

I have an opinion as to whether or not the building is now safe for use and occupancy for hotel, theatre and office purposes. I think it is perfectly safe. I have an opinion as to whether or not the building is now solid and substantial. I think, generally speaking, that it is solid and substantial. I also believe—I don't know whether there has been enough investigation to find out whether the injury to lugs or brackets on columns have already been received. I should say that is a thing to consider. I don't know whether it has been. I should say there should be some further investigation as far as this injury to the construction of the building is concerned, and especially referring to the interior construction, not the enclosing walls, because I think they are perfectly safe. If you should find any more fractured lugs or
799 brackets they could be repaired in the same way the others have been.

I have an opinion as to whether or not the building at all times during a term of years commencing with January 17, 1887, and ending August 1, 2085, were kept in good repair and in a safe and secure condition, it will continue, or will deteriorate until before many years have elapsed it will be unsafe and unsanitary, on account of defects inherent to its character and construction. Nobody can say how long a building is going to stand up and be safe, but I should say, as far as the indications are at the present time, that the building can stay there indefinitely.

I have an opinion as to whether or not there are fundamental defects of inadequate construction and engineering design in the building of so radical a character as to be fatal to its continued existence, whether in its present condition or with extensive replacements or alterations. I consider the construction above the foundation to be all right and proper, excepting the foundations, and I have already expressed myself about the foundations. I have not been able to discover any fundamental defects, unless you call the floating foundations a mistake. I believe it is possible to put caissons under the Auditorium. The operation of putting caissons under the Auditorium would not endanger the safety of the building. It has been done in a number of instances, and I have had experi-

ence with a number of instances. The operation would not interfere materially with the use of the building. Supposing caissons were placed under the Auditorium Building
800 in a good workmanlike manner, it is possible there would be some settlement. But we would safeguard against that by putting such parts of the buildings as might be in danger on screws, so we could manipulate the building on screws, keep the building on screws. I am talking now about during the operation of putting caissons in. Of course, we would have to look the situation over pretty carefully and determine beforehand about how far back from where we were digging the hole, where the effect would go, but we would take care of that situation by, as we would call it, laying the construction on screws. There would not be any settlement after caissons were put in and the job completed. If there is no major disturbance of the clay below datum, close enough to cause a settlement of this building, there is no reason, in my opinion, why the building as it now stands should not continue to stand without caissons, but with simply necessary repairs to keep it in condition and cover wear and tear, for an indefinite period of many years.

I looked over in a general way the table of levels that was produced by the witness Maurice L. Greeley, for the purpose of ascertaining therefrom the variance in settlement between adjacent piers. I should say that there is a variation of probably 4 to 7 inches between adjacent piers. I find that in these last readings here, that is, in 1924. Now, for instance,
the first reading is on column 1, and the column adjoining
801 that, or the point adjoining the first, is 14.03, and the next one is 13.94. That would be about 9/100. Nine hundredths, then, would be just about two inches. Those are between piers 1 and 2. There is 13.81 and 13.91, that is between 22 and 24, up along the Congress street side, 1/10 of a foot. That is a little better than an inch. Take piers 10 and 11, 13.06 and 13.19; there is a difference of—13/100.

Cross-Examination.

I did not intend to make any answer that would imply that the cast iron column was better than a steel column. The question that was put to me was with reference to certain advantages of the cast iron column. There is advantages, possible advantages to every material, and possible disadvantages, and I was asked to state some of the advantages,

which I did. The advantages and disadvantages of cast iron columns, as compared to steel columns would compare altogether on an individual case. You could not generalize in a case of that kind at all. I do not know of any case in which a skeleton construction building was built with cast iron columns in the past 20 years. I do not know of any building of that type with cast iron columns that has been built in the last 30 years, that is, a skeleton building. I am frank in stating that cast iron is not a material that has been generally used in skeleton buildings. I told you that there are certain advantages when you put a cast iron column in a building; there was a certain amount of play in it. That applied to conditions as they existed at the Auditorium. It was not a general application. We have built a great many build-
802 ings that are skeleton buildings, and I have used a great many cast iron columns in walls, gravity walls and going to a considerable height; 7 or 8 stories the highest. In the '90's I built quite a number of buildings with columns that high. There have not been any in the last 25 years that I know of, because reinforced concrete came in and took the place of the cast iron. Take the Auditorium building, whether the construction would have been better or worse if the columns had been steel, in my judgment, there is an advantage in the play in the joints, and I think otherwise it doesn't make any difference. I think the cast iron columns, under the conditions of the Auditorium, where you don't have wind stress to take care of, it makes no material difference, as long as you keep the building within the limits of cast iron. The fact that the beams or girders that are used in the Auditorium are connected with cast iron lugs on the columns might be an advantage. In the case of the Auditorium, it is no disadvantage at all. It is partially so, because of this play that I speak of, but my judgment there is due to the fact that we don't have any wind stresses or anything of that kind to take care of.

In any skeleton construction building that was broad enough in its area to make wind stresses unimportant, it might be advantageous to use cast iron columns on lugs. It depends on the individual case. In putting up today a skeleton construction building, which did not require any particular attention being paid to wind stresses, it would not be an advantage in such a building to use cast iron columns, with cast iron lugs, as opposed to steel columns and

riveted connections. The way we are using steel today,
803 I probably would use steel insteal of cast iron. There is no particular disadvantage, and the steel as a material we seem to be working with today is cheaper and is easier to secure, and I will also say at the present time is more dependable; generally more dependable; has always been,—structurally. Now, if I were putting up a skeleton building of large enough area to make wind stresses unimportant, whether it would be just as advantageous to use cast iron as steel for the columns, if I had the cast iron properly inspected to know that it was in accordance with the specifications, from an engineering viewpoint, it probably would, and what would determine it would be the matter of cost. If I could buy the cast iron column for a great deal less money and be sure I could find a manufacturer now who would be skillful enough to make them, and I thought there would be a saving of money, I would want to save the money for my time.

I do not know of any skeleton construction in the last 25 years where cast iron columns have been used. I think the reason is that cast iron has its limitations. First, the limitation in regard to the manufacture of the material; the possibility of making a column that will sustain a load that approximates the load we might put on steel. That is, you get a certain amount of load on a cast iron column and then you have to stop because you can't make it. That is one thing. And then, as I said before, we have the element of wind stress, and so forth, to consider, and it is not—in that larger sense, it is not a practical material, practicable
804 to use. There is greater liability to fracture in a cast iron column, or the lugs attached to it, than in a steel column to which the beams are riveted. It is a more brittle material, very much more brittle. That is not necessarily a disadvantage. Now, it might be a good thing for the lug to snap off. I have already testified I considered that an advantage in the Auditorium. Now, if these connections were of steel and all riveted up, I don't know, and I don't know as anybody knows, what the damage would be, but it is easy to conceive; easy for me to conceive that something more might happen to the Auditorium than simply the fracture of the lug, which does not affect the integrity of the column and which is a simple thing to fix. If I were going to put caissons under it, this brittleness of the material and liability to fracture would not make any difference or be an advantage over steel in that process. I have picked up a great

many cast iron columns in just that way. It is a matter of analysis in figuring the thing out for each particular case. You can't generalize on these things. You must remember this. We have become accustomed to steel, and we are using steel, and we are buying steel for less money. It is a material that to a certain extent has supplanted iron, and that has a great deal to do with it. We can get it quicker, and speed is a big factor in this business. You can always get steel in about one-third less time than you can get iron.

I stated that cast iron had its limitations in regard to height, and it was not good material as far as wind stress is concerned, and practically every building, when you
805 get up a certain height, you have a matter of wind stress to consider, and there are also these other factors I have outlined, one after the other. They may have figured wind stress in the Auditorium Building. It is taken care of. The probability was that the walls are taking care of whatever wind stress might be figured on. My superficial judgment would be a building of that area and that height, which is not of great height, would not ordinarily call for wind bracing. A good many buildings I have had something to do with have been quite as large in area as the Auditorium. The Congress hotel; McCormick Building; I have given case after case of buildings that are as large as the Auditorium in area, but they are all of great height. They are all of steel skeleton construction, and there are none of them that have any cast iron columns in them, unless in some out of the way place. There is not a single building of that type, that has been put in the City of Chicago in the last 25 or 30 years, that uses cast iron columns. There are limitations as to the height you can go with cast iron; as your load keeps on getting larger, you get a column that is larger and larger. Now, you get a limit to that. In a building 20 stories high you could not use a cast iron column in a building of that kind. I believe generally that 12 stories is as high, generally, as cast iron columns would be usable, although the Tacoma Building is 13 stories high, but it is all a matter of load on the columns and spans, floor spans, and all that. You can fix that definitely. It might have a system for ten stories—
806 the floor area that a column has to carry, it might be 13 stories, 14 stories. I don't know how big the biggest cast iron column in the Tacoma Building is. I can't say what is the biggest cast iron column, in diameter, that I know has been used in any building in the City of Chicago. I don't

know of any that have been used in buildings of 12 stories and up, that have been greater than 12 inches at the base. We have used steel for a great many years, and practically everything we do is steel.

The fact that the Auditorium has undergone this strain or distortion, or whatever you call it, in the process of settlement, would not create a very considerable element of risk in the case of an attempt to put caissons under the foundation of that building. I am absolutely sure about that, perfectly sure. And I think I am clear about it without having made any of the investigation that I suggested it might be desirable to make, barring this one thing—the connection of the beams to the columns, I would want to investigate that. I would not investigate every connection. I would take certain typical instances. I would look through the building and I would size it up, and I would say, "I think I ought to look into this," and another place I would look into something else. I would use my judgment where I would look into it and where I would not. Bearing in mind the fact that the construction of that building is horizontal beams or girders attached to columns with cast iron lugs, whether I could take a few typical instances and be reasonably sure that the 807 building would not have serious fractures if I were going to put caissons under it would depend on what I would find altogether. If I found typical instances, I would look further. If I did not find difficulty in the typical instances you suggest, I would then think it was safe to go ahead. I would take my chances. If the owner of the building employs a professional man he has to take his chance. I wouldn't take the job if I thought there was an particular chance. I would not wait to decide that I would take the chance, until I had made a thorough investigation. I would take the job now. If you people want to employ me, I am willing to be employed. I am willing to say, sitting right here in this court room, that I know enough about the building to assure the owners you could safely put caissons under it.

I know of an instance in the City of Chicago in which caissons have been put under a building with floating foundations, put in below the blue clay, with cast iron columns to which horizontal beams or girders are attached. There was a building that stood at the corner of State and Adams street, where the Republic Building is now, and that entire building was put—with cast iron columns—was held on temporary supports while the caissons were put in, and the owner got

rental out of the building while the construction was going on. We shored the building and put the entire building on screws before we started to excavate for the caissons, and then dug the caissons to rock, and filled them up, and left the screws there until the building was all finished, so the
808 owner could get rental out of the building. Before we began the foundations of that building, I do not know of a single instance in the City of Chicago in which a building of any considerable size, that was of any size, with the foundations resting on the blue clay, or above it, and had cast iron columns to which the beams or girders were attached by cast iron lugs, and in which caissons were put under the building, or any part of it. I don't know of a case, but it simplifies the problem, because it gives more room to work in the basement. As far as the foundations are concerned, it would complicate the situation at the Auditorium if the foundations were above blue clay. It would make it more difficult. I don't know of any case in which a caisson has ben put under the building foundations that went below blue clay. It would be more difficult if the foundations were above the blue clay, because we would have a settlement problem to contend with. I have already testified about that. If the building was built on the upper stratum, because we would have a water bearing stratum, and the minute we cut through with it, we would have all the water in the neighborhood to contend with, and our building would be coming down in a way it would not if it was on blue clay. In the process of sinking caissons, we would have to go through whatever was there. If we had floating foundations resting above the blue clay, we would have to go through blue clay in the first instance and that would start the trouble I spoke of, unless
809 I put the building all on screws. That is part of the process. I would have the difficulty of having immediate trouble with the water. I would simply have to extend the shoring operations beyond what I would have to do if I did not have that stratum to contend with. I would have to shore over a greater area at the same time. Now, we have a floating foundation that rests on this blue clay, and we are going to put caissons under that foundation that would be more difficult than if the floating foundation went through the blue clay. If your floating foundation is above your blue clay, you would go in and spread out some kind of a foundation around the pier or column you were going to lower, but

I would dig through that upper material down to blue clay, so that I would have the benefit of that support temporarily. When I put the caisson down through the blue clay, trouble with water would begin at once, if I did not support my building on screws. The water don't affect the blue clay at all. That water stratum affects any load that is on top of it, and also interferes with your digging, unless you dam the top of the hole.

I did not hear Mr. Mueller testify about what happened to the Auditorium Building when they dug the holes for the pistons under the stage.

Mr. Mueller's testimony was then read to the witness as follows:

"In order to get that system, that is the stage system into the ground, sinking of the stage floor 18 feet, there was a displacement there of 36 feet. They had to be dug into the ground. While they were digging those 28 cisterns we had a settlement around the outside tower walls of almost 4 inches during the six weeks while those cisterns were being put in."

Mr. Cooper interjected the explanation that Mr. Mueller did not say the "tower walls"; that it was a mistake in the record and that he had meant the walls surrounding the stage. Mr. Fisher replied that it was pretty hard to get that interpretation because he says "around the outside tower wall."

Mr. Mueller, who was in the courtroom, was then asked whether he now testified that there was any sinking of the tower when the cylinders were being put in under the stage. Mr. Mueller replied "No, sir."

If you started to put a caisson down through that blue clay, down to bed rock, and the building rested on the blue clay, as far as doing work is concerned, it would simply mean this: If we had the blue clay to start with, it would be a simpler job of shoring. If the building was above blue clay, it would be a more difficult job to shore up the building. There would be no effect of the sinking of the caisson on the underlying soil of the blue clay. There would be no difference as far as the water or moisture was concerned. If the floating foundations were carried through the blue clay and rested on the soft clay, when you started to put the caissons in there would be no effect at all there as far as moisture is concerned. Whether there would be any effect as far as the movement of soil is concerned would depend a great deal on the individual case. But, generally speaking, I don't think it

would make any difference. It wouldn't make a bit of difference. Where you get the floating foundations carried through and below the blue clay, the foundation still rests on a
811 blue clay. As you go down in it, it becomes softer. When I said it would be easier to put a caisson foundation under a floating foundation if that foundation went through the thicker and less fluid blue clay and rested on this softer blue clay below, that referred especially to the Auditorium. I don't know of any operation whatever, in which caissons were put under foundations, where the foundations were floating and were below the blue clay, down in this soft clay, for the simple reason that that has not been the practice. We endeavor to stop on blue clay. I am perfectly willing to come right out with that evidence and without any question. It was a mistage to cut through the blue clay, to start with in the Auditorium building, but that has been overcome by the actual load on the soil. That is my contention. This very extraordinary sinking that has gone on has compressed the soil so the soil now has a greater bearing resistance than when the building was built. It is probably true that the bearing resistance that this had in the ten years or nine years has still not been sufficient to prevent it from sinking in a number of places from an inch and a half to two inches and a fraction. There has not been any particular disturbance of the neighborhood of the Auditorium in the past nine or ten years. I mean no buildings or deep foundations. It is my opinion that the putting in of deep foundations in the general neighborhood of a building on floating foundations does not jeopardize the existing building, unless you get close to it. My experience has been with these numerous ones that I have excavated—I have had direct charge and then I have had
812 a great many when I looked after the interests of adjoining property owners, and the rule is that it does not go by the support on the line. Occasionally we have an instance where we have to take the next row of columns, but it is not very often. There is a wall—if there is an adjoining property downtown, there is an adjoining wall. Sometimes it is a party wall and sometimes it is an adjoining wall. Now, no matter whether it is a party wall or an adjoining wall, that is supported temporarily on screws. Now, as you leave the wall on the inside, when you get away 16, 18 or 20 feet inside the property, you will find a line of columns, supporting the floor loads. As a rule, I do not have to do any more. The supporting wall on the line—for instance, the Chicago Temple

is the last instance I had to do with. In 75—I think not in over—in at least 65 per cent of the cases we only have to carry the wall on the line; and in the other 35 we would go in one column span. Suppose there is an existing building on a lot and they are going to put down caisson foundations in the neighborhood of that building. The caissons that are being put down in 65 to 75 per cent of the cases have to be the adjoining wall in order to affect any wall of the existing building. Within a foot or two feet. The chances are about even that you would not have to do a thing 10 feet away. I am talking of the buildings as a whole and as I know them resting on blue clay. That is applied to blue clay. It would not be above blue clay, because no matter what you do with a building above blue clay, you would have trouble.

813 I have had something to do with the Monadnock Building. It is my understanding that the foundation in the Monadnock Building rests on top of the blue clay. There is an excavation going on across the street from the Monadnock Building. The nearest caissons in that building that is now being constructed are the width of the street—I should say about 30 feet, from the outside walls of the Monadnock. Well, I should say 25 feet. It is near enough so as to be a very wise precaution for the owners of the Monadnock Building property to have estimates and plans made to take care of their building, because they are putting down caisson foundations 25 or 30 feet away. It is a very wise precaution, indeed. Now, when it comes to taking precautions, I have been accustomed to take precautions everywhere. I take levels in buildings on the other side of the street. The situation, for instance, across the street here, in this building that is being constructed, is sufficient to justify an engineer and an architect like Mr. Renwick in expressing the opinion that he feared there might be an effect upon the Monadnock Building. In 65 to 75 per cent of the cases, and in every case, I would take levels on the adjoining property, as a precaution, and you can't always tell where you are going to get your trouble; not until afterwards. I would take precautions in every case, because in 65 to 75 per cent of the cases, something is liable to happen. And there is no way of telling in advance whether a given case falls in one class or another. I want to say this: I was speaking of properties, that come close to the building line, because your buildings,

814 your hypothetical building that you are speaking of, is on the building line, whatever building it is. Now, then,

what I intended to say is that your point of great danger is immediately adjoining the wall, adjoining the wall. And as you leave that wall and go away from it, as the building in question is further away from where you excavate, the danger becomes minimized. You have an existing building and it is on a lot line. Now, if I were going to put another building, say, 500 feet away, with caisson foundations, I wouldn't pay any attention to it. As you approach the building with the caissons, how near must you get before you think you have reached the zone of danger, which requires an investigation? I have answered that; that I investigate everything around on the other side of the street. That is, as near as I can come to answering it. I investigate everything, regardless of every other consideration. I never take any chances. There is a point where you begin to take precautions and make investigations as the line of those new caisson foundations approach more nearly to the existing building than 500 feet. We make a point of establishing levels on all of the buildings in the same block, and then we make it a point to establish levels on all buildings on the opposite side of the alley and on the opposite side of the street or streets. I couldn't say that it would at 400 feet, because that is not the way we look at it.

"The Court: Don't you think you could answer in feet where the danger would be?

815 The Witness: It is a peculiar question to put to me and my mind don't operate in that way. I want to answer the question and I think I have answered him what we do know. What might be applicable to one case would not applicable to another.

The Court: You mean the difference in the kind of soil and that sort of thing?

The Witness: That is the thing. We don't know, and because we don't know is why we establish those levels, to be absolutely safe.

The Court: Could you tell anything about it from the history of the building?

The Witness: The trouble is we don't know about the history of these buildings and we don't know anything about the buildings that might be around.

The Court: Now, take the practice with reference to all buildings across the street and in the same block.

The Witness: In the same block, and there are reasons for that. That is, we take levels in the same block and levels in

the same block in all buildings across the street and across the alley. Now I am telling you what has been my practice and as far as I know what the practice is.

The Court: Now, in that practice, there may be caissons in which some damage might be involved and you have to watch it all, is that right.

The Witness: Yes, there is more than that. You get into legal questions. In a block, we may have three or four party walls and line walls, and frequently some very interest-
816 ing legal questions come up, so we protect ourselves. There is a settlement in the building that might cause damage.

The Court: Now, I think he has answered your question. You can reduce that to feet."

If I am putting up caissons in a different block, and across the street from the existing building, I would take levels there. The situation would be such as would require me to take levels as a precaution, not for the reason that something really happen that would injure the existing building, but just a sense of safety to be absolutely safe.

I think the situation of the Monadnock building across the street here is such, with reference to the foundation of the Standard Club that is across the street from it, to justify the owners of the Monadnock Building and the architects and engineers called in to examine them, to carefully watch and examine the sinking of the caissons across the street in the Standard Club on Dearborn Street, to determine whether those foundations may affect or damage the foundations of the Monadnock Building. I would say it would be good judgment to do it. They might do a poor job of excavating across the street. I would say it is about sixty feet from the Monadnock Building across Dearborn Street. I was not called in by Mr. Renwick and asked for any opinion or advice in connection with the Monadnock Building and the operations going on across Dearborn Street, or across the alley to the west, where the Union League Club building is being erected.

Mr. Fisher: "Mr. Renwick has told us that he was
817 called in, that they have gone into that, made some plans. He said we could see the plans. We have not been able to get any. He told us what the designs were, told us what they were doing there."

Mr. Cooper: "The plans were not perfected because it has not been found necessary to put caissons under the

Monadnock Building. Iam entitled to say that, since counsel has made that statement."

If they should construct a building with caisson foundations across Congress Street from the Auditorium Hotel and immediately west of the Congress Hotel, I would not think that there was an possibility of those caissons affecting the Auditorium building or its foundation. I think the distance is too great there. And also this other thing: That my understanding is from everything that has been said, that the foundations of the Auditorium Building extend down at least to blue clay, or below blue clay, so we won't have that upper stratum to contend with, which I talked about. I think it is possibly 60 to 70 feet across Congress Street from the Auditorium Hotel to the line that would probably be occupied by a building for an extension of the Congress hotel. Whatever the ordinary width of a street is. A little narrower than the distance from the Monadnock Building to the Standard Club. The distance across from the Congress Hotel to the Auditorium would be narrower, so far as distance is concerned, there is a greater danger across Congress Street than across Dearborn street. As you go down on the Auditorium Hotel ground, before the Auditorium was built, you first get a lot of loose soil, and then you come to some
818 hard pan or something of that kind, and then this soft blue clay. The water we have been talking about is above the blue clay. The foundations of the Auditorium Hotel rest in the blue clay. Because the caissons that are going across the street on Congress street are opposite a foundation of that character, there would be less danger from those caissons than there would be if the foundations of the Auditorium Hotel were above blue clay. On blue clay it would make it just as secure as it is now. The difference is on blue clay or below, the distinction being, above blue clay. If the foundations of some building, being floating foundations, are enough above blue clay so there would be a space between the foundations and the top of the blue clay for water to get in, then if you dig for caissons across the street there is more likely to be trouble. I have seen it. And it is just that distinction, that the foundation is above blue clay, making it possible to have some water in there, that affects the situation.

819 JOSEPH FISHER, a witness on behalf of the intervening petitioners Aida Lester and Minna Lester, testified as follows:

I am an attorney associated with the law firm of Sonnenschein, Berkson, Lautman & Levinson. Aida Lester and Minna Lester are the legal holders and owners of the bonds of the Chicago Auditorium Association, Nos. 8, 10, 11, 213, 228, 274 and 479, in the principal sum of $1,000 each, and bonds Nos. 633, 636, 646, 647, 653, 654, 655, 656, 709, 928 and 930, in the sum of $500 each, together with interest coupons Nos. 73 to 80 attached to each and every of the bonds hereinabove enumerated, the interest coupons attached to the $500 bonds being for the sum of $12.50 each, and the interest coupons attached to the thousand dollar bonds being for the sum of $25 each. All of the bonds are signed by the Chicago Auditorium Association and secured by its trust deed of February 1, 1889, to the Illinois Trust and Savings Bank.

In my opinion as the duly authorized agent of Aida Lester and Minna Lester, the present building and all improvements situated on the premises constitute a substantial portion of the security for the payment of these bonds and the other bonds secured by the said trust deed. Also we deny that
820 the complainant has any power to tear down or remove the present building situated on the premises or any part thereof.

821 CARL C. BULLOCK, intervening petitioner, as witness on his own behalf, testified as follows:

Direct Examination.

I am the owner of the following 5 per cent. first mortgage bonds of the Chicago Auditorium Association, dated February 1, 1889, and due February 1, 1929: Nos. 295, 297, 465, 285, 84, 489, 111, 229, 230, 314, 466, 316 and 490 for $1,000 each; and Nos. 1155, 1152, 1151, 1159, 1153, 1156, 1157, 1158, 1154, 1108, 604, 1109, 1113, 1114, 1115, 1116, 1107, 1110, 1112, 1021 and 1111 for $500 each. The total amount of these bonds is $23,500.

822 FREDERICK J. THIELBAR, a witness on behalf of the defendants, resumed the stand for further cross-examination, and testified as follows:

In the process of putting caissons under the foundations of the Chicago Auditorium Building, it would be necessary to support the walls and the columns under which I was putting those caissons during the process of inserting the caissons. It would not be necessary to do the operation under the building as a whole, substantially at the same time. I would do it section by section. I would not put all the caissons down at the same time. In regard to putting the building all on screws at the same time, I would not think that would be necessary. I would not put any more of the building on screws than I would have to at the same time. I should think that it wouldn't take more than two columns or two spans beyond the point where I was working on a caisson. If I were going to put caissons under the tower foundations of the Chicago Auditorium I should say that to begin with I would probably support half of the tower on screws while I was conducting that operation. I would leave the foundations in any event as they are, but I would endeavor—I would keep on working on the others during the preliminary work, but I would feel justified in beginning the excavation of the first caisson if probably half of the tower was supported on screws. I would endeavor to get in one caisson as quickly as I could. As far as the tower is concerned, I wouldn't put down more than one caisson at a time. During that process I would say I would
823 have probably half of the tower on its normal foundation. The rest would be on screws. In the meantime I would be taking levels to see how it was coming along. There is nobody who can tell for a certainty just what would happen. To protect myself I would be having levels and bench marks everywhere around. I can't conceive of anything happening to threaten the integrity of the structure while I had the building in that condition. Whether I just take these precautions and watch these levels, etc., in order to protect myself against dangers I can't possibly conceive happening, depends on the definition of dangers. If settlement takes place some place I don't consider that a danger. The danger would come in not knowing about it. I would take that as a normal part of the process to keep myself posted. The purpose of keeping myself posted is to a certain extent to be able to do some-

thing I can't conceive of there ever being any necessity of doing.

I would select one caisson and then I would select another spot. I would want to secure—take advantage of having that one caisson to secure the tower at that one point at least. I would select another spot for another one. I can't say where without going into details more than I have done, that is, generally. The truth of the matter is that I haven't gone into minute details at all with respect to this problem. I have gone into details enough to make up my mind I can do the job, but when it comes to the little details of working out this and that, of course, I haven't done it. It would take
824 weeks to do that. I have looked at the building and sized up the conditions and made up my mind I could do the job. I won't say in an offhand or general fashion. I will say just what I said. As to how much pressure or how much load I would have to take care of, well, I have not computed the load. I have not computed the load I would have to carry at any point in that building for the purpose of putting caissons under it.

We have been told by a variety of witnesses on both sides of the case, as I understand the record, that the exterior walls are supported on piers or consist of piers practically which have pyramidal foundations, that is to say, foundations which are pyramdial in form, with a broad base and then going up to a narrower top or apex. We call them piers. The piers are under the exterior walls and they have one section throughout. Under the tower there is a batter. I would say batter, that is a better term. Batter means broader at the bottom than at the top. A pyramid is something used outside of a building. There is one in New York City, I believe. You have a foundation of precisely the same shape as that pyramid that is outside, but somehow or other it wouldn't appeal to me as a correct term to call it a pyramid foundation. It might look just the same, except the pyramid has no load on top of it.

I would take one pier at a time, and I would figure the load. I would first figure the load pretty carefully and then I
825 would use a system of needle beams and cross-beams and cribbing with screws, leaving a space where I proposed to put the caisson. I don't know approximately the load I would have to carry upon one of those foundations. I simply know that I have carried walls that are heavier than those walls. I am using my judgment in that particular, establish-

ing a relation between it and what I have already done. I haven't made any figures at all. I wouldn't say that there isn't anything for you to do but just take my general conclusion. I object to general. I would rather leave it the way I have expressed my opinion. I did use the word general a while ago when I said I made a general examination and investigation. I would rather have it said the conclusions are quite definite because I am fixed in mind I can do the job. I said I had examined the building and sized up the loads in a general way, not specifically sizing up the loads. I recall other instances where I have done similar work with loads that were heavier in my judgment. I at once conclude I can do the same thing here because there is less load to carry. No, I can't give you the figures on what load I contemplate carrying. We haven't put any caissons under a batter foundation of this description. I do not think that makes any difference. I have not put caisson foundations under any foundations of the pyramidal or batter type that are under the Auditorium.

As to the wood that is in the balcony construction in this building, I told you there was a great deal of wood in certain other buildings. The wood in those buildings is placed or situated in a manner essentially comparable to the way the wood in the Auditorium building is located. It is
826 simply floor wood with sleepers underneath and fireproofing material, cinders or other substances, between the sleepers. Sometimes it is between and sometimes it isn't. I don't recall at this moment of a case where it isn't. I am sitting on a platform that is all wood, consisting of wood. This is a fireproof building. All this construction (indicating) is wood on top of fireproof construction. There is something more there than sleepers. I should think in the present instance here this is worse, I should regard this as more of a fire hazard than the Auditorium. I mean that there are other buildings I know of where there are wooden floors resting on sleepers or strips with fireproofing material, cinders or other substances between, and that also in some buildings like this court room you are sitting in there are benches and railings and a platform to put a seat on or the furniture that is sitting around the room. My statement was intended to convey the idea there is more or less wood used in all these buildings in Chicago, most of them. Now, in the Chicago Auditorium this wood under the balconies I have been testifying to you could regard it as structural and you could regard it as otherwise.

I am willing to regard it as structural. I do not think the definition of it is essential at all. Now, flooring, if there should be a fire in the building, that does not simply char. There have been cases where the fire has gotten underneath the floor, although I will concede that is a difficult matter to do that, although there are instances. Fires in fireproof buildings are extraordinary. We have had very few of them. I should say that the burning of a floor other than by char-
827 ring is an exceptional instance. Speaking of the nature of fireproofing underneath this wood in the Auditorium, all I mean in that regard is that there is a considerable vacant space below the wood which is called dead space, and then below that there are some steel strips or angle irons and some material used on them, metal, tile, tile arches, structural beams, and, some places, suspended wire lath and plaster, that would be fireproof. If there should be a fire in the Chicago Auditorium I do not think that wood there under the balcony would constitute a real menace. None at all. I should think that when you take the occupancy of the theatre into consideration it wouldn't make very much difference one way or the other whether this fireproofing that is there was there or not.

I told you these columns that were figured by Mr. Parker were not typical because they were next to stairways. By that I mean that the load factor has in certain respects been figured at 100 pounds instead of at 50 pounds. That would be part of it. The stair column is a unique column because there isn't any other column loaded with the same weight. We speak of a typical column, that is a building term, a typical column, might be called a technical expression; it represents the general run of columns throughout the building which support floors. If there is any other column loaded in a different way from the general run of columns, that is something else. The columns figured by Mr. Parker support floors. They support floors precisely like any other column in the building at some points. The row of columns that are figured from the bottom to the top by Mr. Parker they support stair platforms and on the top floor I believe there is a floor.
828 Generally they support floors as well as stairs. But from the bottom of the column in that entire tier each column from the top to the bottom supports floors as well as stairs. The city requires certain floor loads for different types of buildings. It requires an applied load of 100 pounds on the stairs. Those loads go back to the columns. A part of a column—you can't say a part of a column supports a floor

and another part supports stairs. It all goes back on the load of the column. You can't differentiate on the load because you get a total load which goes back on the column. The way it goes back on the column is that you must figure on that same column so much of the load as is floors at 50 pounds and so much of the load as is stairs at 100 pounds. There is not any other difference whatever for the purpose of computing loads on columns that distinguishes these columns figured by Mr. Parker from any other columns in the building. In figuring the allowable load under the ordinance you have to figure 100 pounds for the stairs instead of 50 pounds, that is the only difference.

I am associate architect on the Chicago Temple and was there throughout. I mentioned yesterday the party wall being one of the walls. The next line of columns in the Title & Trust Building was not supported on screws. The bearing I think that has on this Auditorium question is this: You were questioning me in regard to the care of adjoining property. That came up in connection with that, but I was not allowed to finish the statement. In the Chicago Temple caisson foundations were installed right from the start. There wasn't
829 in any sense whatever the substitution or insertion of caissons under a building that was constructed with spread foundations.

As to putting caissons under the Chicago Auditorium Building at other points in the exterior walls than the tower, whether I would operate on one of the batter foundations or pyramidal foundations at a time or would regard it as necessary to operate on a number of them. I didn't see any of the batters under the exterior walls. All the piers I saw, as I recall, were straight piers, but I would be very cautious to begin with. I wouldn't want to sink more than one caisson at a time. What would I do about the interior walls while I was performing this operation on the exterior walls? As I recall, the columns are generally at quite a distance from the exterior. I mean that on Congress street, for instance, the first span is a girder span, which I think is about thirty feet. There is a possibility I could put those caissons in without taking care of the next support, say, if I was working on Congress street, to the first line, to the foundations to the north. But I should think I would have—probably as a matter of precaution I would want to shore everything within 50 or 60 feet of where I was digging the caisson, but that I would have to determine after I got a start. That would be true

all the way around the exterior walls. Of course, I would be getting experience as I was putting in the caissons. Every operation is one of experience to a certain extent. That would not be more particularly true of this operation than any other one. We are always cautious when up against a building.
830 We don't know just what is going to happen and safeguard against it. I have given you the safeguarding methods I would employ. I can't give anything in addition. Caution, that is all.

Redirect Examination.

In considering the question of putting caissons under the Auditorium Building, the fact that the sub-soil has been under the pressure of the weight of the building for a period of 35 years or more makes the problem less difficult. Simply because the shoring will be simplified. We don't have to carry the shoring back so far from where we are working in any one point. The soil underneath the existing walls and columns has more resistance than what it had before. I would be depending on that.

This process which I mentioned on cross-examination with reference to the use of needle beams, cribbing and the like, is the usual and customary process used by shoring contractors at the present time. I mean by shoring contractors who aid in the process of holding up the building while you are putting the caissons under it. There is not anything novel in the application of that to the Aditorium that I have not mentioned. Whether the foundation is battered or not has nothing to do with the case. It is absolutely a question of
831 weight. It is not necessary for you to compute the absolute load on the foundations before you are able to form an opinion as to whether or not you can put caissons under the building. I base my answer upon observation and prior experience which I have had with other buildings. I would say some of those buildings were even heavier in my judgment than the Auditorium.

A while ago I said I did not get to complete my answer to the cross-question in regard to the work I did on that party wall at the Chicago Temple. I will do so now. It is a matter of supporting the party wall on screws during the construction of the caissons. The wall is a party wall and we had to penetrate the old floating foundation. The wall was abandoned as a supporting wall, as a party wall, because we were obliged

to depend on caissons for our building, we were obliged to go up to the lot line with the caissons, and to do that we had to cut holes through the floating foundation. Before we could do that we were obliged to load the party wall on screws, a 16 foot long party wall. The party wall to which I refer is the party wall along the east side line. The adjoining building is the Chicago Title & Trust Building. The party wall was a wall on the Chicago Title & Trust Building on the west. That is the wall we went under. That is the wall that had the floating foundation.

It is possible for a column to support both floors and stairs. Where a column does support both floors and stairs in computing your load you have to use 100 pounds per square foot live load for stairs and 50 pounds per square foot on
832 the floor with reference to the ordinance now.

Mr. Cooper: "By the way, your Honor, yesterday during the cross-examination the figures 65 and 35 were interchanged. You may remember it in your Honor's questioning."

The Court: "I thought of it at the time."

I said I would put down one caisson at a time. Well, I would spread the caissons pretty well to start with. I would have to get the loads accurately before I would determine just where they would be. Supposing when I was putting down one caisson at a time it should develop from these precautionary levels which I would take, some settlement at an adjacent point, occurred, at a column or pier, I would put that column or pier on shoring in order to take care of it. I have had experience of that kind. I do not mean to say I would do the whole job on one caisson but I would begin with one and then enlarge as I went along. Do it by installments.

833 HENRY G. MILLER, a witness on behalf of defendants, testified as follows:

I am an attorney at law practicing in Chicago, ever since 1899. I have examined the title to the real estate covered by the lease from Walter L. Peck, Clarence I. Peck and Ferdiand W. Peck to the Chicago Auditorium Association dated January 24, 1887, which has been introduced in evidence in this case. I have made an examination of the title to this property covering a certain period. I started in on the as-

sumption that Walter L. Peck, Clarence I. Peck and Ferdinand W. Peck were the legal owners of the property on January 24, 1887, the date of the lease. My examination was of an abstract of the title made by the Chicago Title and Trust Company covering the period from and including January 24, 1887, to and including April 15, 1922. From my examination of this abstract and starting on the assumption that the title was in the Pecks as I have mentioned, I found that on April 15, 1922, the legal title to the property which you have described stood as follows:

(a) The title in fee simple to an undivided one-half of this real estate was vested in William A. Slater, Jr., E. Halsey Malone and Charles Lewis Harrison, as Trustees under the Last Will and Testament of William A. Slater, deceased.

(b) The title in fee simple to an undivided one-fourth of the property was vested in Bayard Warren and Bayard Tuckerman, Jr., as Trustees under deed of trust executed by Elizabeth Sears, afterwards Elizabeth Sears Warren, dated March 3, 1913, and recorded in the Office of the Recorder of Cook County, Illinois, April 3, 1913, in Book 12347 of 834 Records at page 94 as Document No. 5156779 as modified by a certain instrument in writing executed by said Elizabeth Sears Warren, formerly Elizabeth Sears, dated June 1, 1920, and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, September 16, 1920, in Book 16274 of Records, at page 214 as Document No. 6941122.

(c) The title in fee simple to the remaining undivided one-fourth of the property was vested in Bayard Warren and Bayard Tuckerman, Jr., as Trustees under a trust deed executed by Phyllis Sears, afterwards Phyllis Sears Tuckerman, dated April 4, 1916, and recorded in the office of the Recorder of Cook County, Illinois, April 17, 1916, in Book 13844 of Records at Page 479, as Document No. 5846740, as modified by a certain instrument in writing executed by said Phyllis Sears Tuckerman, formerly Phyllis Sears, dated June 1, 1920, and recorded in the Recorder's Office of Cook County, September 16, 1920, in Book 16311 of Records at Page 69 as Document No. 6941124.

That was the way the title stood on April 15, 1922. I this morning examined the records of the Recorder's Office of Cook County, Illinois, and I found that there had been no conveyances of the property by any of the legal owners whose titles I have testified to on or since April 15, 1922. The record title of the legal owners of this property which I have

testified to is, of course, subject to the lease from the Pecks to the Chicago Auditorium Association, and to the extension agreement in evidence in this case extending the term of this lease.

835 Mr. Washburn, on behalf of William A. Slater, Jr., and other defendants, offered in evidence the following documents, which were received in evidence and marked as follows:

DEFENDANTS SLATER, JR. ET AL EXHIBIT 1. Certified copy of bill of complaint filed in the Circuit Court of Cook County, Illinois, October 18, 1920, in Cause B-68136 entitled Herbert M. Sears, Bayard Warren and Bayard Tuckerman, Jr., complainants v. Phyllis Sears Tuckerman and Phyllis Tuckerman, a minor.

DEFENDANTS SLATER JR. ET AL EXHIBIT 2. Certified copy of decree entered in said Cause B-68136 in said Circuit Court of Cook County, Illinois, January 25, 1921.

DEFENDANTS SLATER JR. ET AL EXHIBIT 3. Certified copy of bill of complaint filed in said Circuit Court of Cook County, October 18, 1920 in Cause B-68135 entitled Herbert M. Sears, Bayard Warren and Bayard Tuckerman, Jr., Complainants v. Elizabeth Sears Warren, Bayard Warren Jr., Lily Warren and Camilla Warren, Defendants.

DEFENDANTS SLATER JR. ET AL EXHIBIT 4. Certified copy of decree entered in said Cause B-68135 in said Circuit Court of Cook County, January 25, 1921.

836 On behalf of Roswell B. Mason, Guardian ad Litem, Mr. Miller stated that in response to his request Mr. Fox had produced a letter-press copy book of Marshall & Fox, containing two letters to R. Floyd Clinch, President of the Chicago Auditorium Association, dated respectively September 16, 1915 and September 17, 1915, which he desired to offer in evidence.

Mr. Fisher stated that from the testimony already introduced it appeared that these letters were merely preliminary to a more complete report made under date of April 10, 1917, which he would wish to introduce if the letters were received in evidence, and of which he had a correct copy in his hand.

Mr. Miller stated that when the report was offered he

would reserve the right to object to it on any ground except that it was a copy instead of the original. He thereupon read the letters to the court.

Mr. Fisher stated that the letters, if admitted, would show that they were preliminary to the report of which he would like to read the first sentence: that Mr. Fox when on the stand for cross-examination had been asked to produce the letters and that he was to be regarded as on the stand for further cross-examination. After some discussion the court stated that the witness, Charles E. Fox, was now recalled, as far as the record was concerned, for further cross-examination, and produced these letters and also produced a report dated April 10, 1917. Mr. Fox thereupon being actually recalled to the stand, testified that the document in question dated April 10, 1917, was the report referred to
837 in the two letters of September 16, 1915 and September 17, 1915, which had been read by Mr. Miller. Thereupon, all questions regarding the proper order of proof having been waived, the two letters in question were received in evidence on behalf of the defendants, and marked respectively "Mason Exhibit 1", and "Mason Exhibit 2", and the said report was received in evidence on behalf of the plaintiff, and marked "Plaintiff's Exhibit 79", after the reading of which by Mr. Fisher, all defendants withdrew their objections thereto.

MASON EXHIBIT 1 is as follows:

"September 16, 1915. CEF-S

Mr. Floyd Clinch, Prest.,
Chicago Auditorium Ass'n,
Chicago, Illinois.
Dear Sir:

The writer has made a preliminary examination of the Auditorium Theatre with Mr. Ritter of Ritter & Mott as a start towards the report which you have requested to have made effecting this structure.

Our preliminary examination has established the following:

That the general construction of this building consists of heavy inclosing masonry walls with a skeleton interior construction of cast iron columns and steel or wrought iron beams and trusses, that there has occurred since the build-

ing was built a great deal of settlement in this structure, varying from 22 inches down.

That this maximum of settlement occurs under the heavy masonry walls.

That the skeleton interior construction has settled very much less than the inclosing masonry walls.

838 That this difference in settlement has set a distortion in the interior skeleton construction, which distortion is, in our opinion, the cause of the fracturing and movement of the skeleton construction and the fracturing of struts and connections which have been noted in the past.

That the elastic nature of the construction, due to bolted connections etc., has to a great extent, taken care of this variation in settlement with minimum fracturing.

That our best information seems to indicate that the greatest settlement per interval of time seems to have occurred in the early years of the construction of the building, and that this settlement has been grown steadily less, and that the record of the levels taken in 1912 as compared with the levels in 1915 indicate that this settlement has practically ceased. The cracking which has occurred in the finished plastered and painted surfaces tends to confirm this cessation of movement.

We believe that since this destructive agency, namely, settlement, has largely ceased to operate we could, if we were convinced all points of destructive strains had been corrected, make a positive statement that the structure is in better condition to withstand the strains of occupancy today than it was when the settlement was actively occurring.

We cannot, of course, say that such corrections of destructive strains have been made, but we can say that cast iron lugs and struts, such as you are using in this building, are likely to fail under distortion; consequently that many of these have made themselves manifest by failure and have been corrected.

It is our opinion that as a matter of taking chances within reference to the ability of the structure to safely support the load of occupancy, that you are taking less chances today than you were in the days when the settlement was more active.

You must understand that in requesting a definite engineering opinion on this structure, we must be very definitely informed on the underlying conditions as well as the apparent

conditions before we can make positive statements with reference to positive freedom from danger.

839 As a step towards determining this condition positively it will be necessary to have a set of the structural drawings of this building. With these at hand we can probably determine the sufficiency of the original design as well as points of probable serious straining.

The question of adequacy of the original design will be a governing factor if we are to definitely pass upon the sufficiency of the structure.

In our investigation we have noted with much interest the great care and vigilance that has been exercised by your staff in maintaining a continuous and painstaking inspection of all of the parts of this structure. We find that your people have provided themselves with means of access to a large part of the points where strain is likely to occur, and have maintained record of movement, applied corrections as fractures have occurred, and appear to have had at all times complete control of the situation.

Yours very truly,

MARSHALL & FOX."

Exhibit MASON EXHIBIT 2 is as follows:

September 17, 1915 CEF-R

"Mr. R. Floyd Clinch,
President, Chicago Auditorium Ass'n,
Chicago, Illinois.
Dear Sir:

The writer has made a preliminary examination of the Auditorium Theatre with Mr. Ritter of Ritter & Mott, as a start towards the report which you have requested made regarding this structure.

Advising you particularly with reference to the foundations and settlement which has occurred, we can state as follows:

840 The general construction of this building consists of heavy inclosing masonry walls with skeleton interior construction of cast iron columns, struts and steel or wrought iron beams and trusses.

There has occurred since the building was built, a great deal of settlement from 22 inches down. The maximum settlement occurs under the heavy masonry walls.

That the skeleton interior has settled very much less than the inclosing masonry walls.

That our best information seems to indicate that the greatest settlement per interval of time occurred in the early years of the building and that this settlement has been growing steadily less.

For example:—out of 26 stations on which records of levels have been kept, the record of the levels taken in 1915 as compared with the levels of the same points taken in 1912 show that of these 26 stations, 14 showed no movement during this period of three years, and of the remaining 12 stations there has been a movement of $\frac{1}{4}$ to $\frac{5}{8}$ inch, from which it seems reasonable to conclude that at the time the levels were taken in 1912, the rate of settlement was rapidly diminishing and this taken in connection with the fact that since the finished wall surfaces were last painted, there has been no evidence of settlement, leads us to believe that the settlement has ceased.

It is a simple matter to verify this conclusion by another set of levels after a reasonable period has elapsed.

All complaints affecting the integrity of the construction which have so far come to our notice have their origin, either in settlement or strains caused by settlement.

We believe that since the settlement has ceased, the building is in safer condition today, than it was eight or ten years ago, when the settlement was going on.

In our investigation, we have noted with much interest the great care and vigilance that has been exercised by your
841 staff in maintaining a continuous and careful inspection of all the parts of this structure. They have maintained a record of movement, applied corrections as required and appear to have had at all times, complete control of the situation.

Yours very truly,

MARSHALL & FOX,
Architects.

'We concur in the above:
RITTER & MOTT, *Engr.*
L. E. RITTER.' "

PLAINTIFF'S EXHIBIT 79 is as follows:

(Copied 5-15-22 s)

tiff's
hibit 79.

April 10, 1917. CEF-s

Re Investigation of the Auditorium Space in the Auditorium Building:
Mr. R. Floyd Clinch,
President, Chicago Auditorium Association,
Chicago, Illinois.
Dear Sir:

Carrying on the investigation of this building as referred to in our letters sent to you September 16, 1915, and September 17, 1915, we have been making measurements, calculations and investigations from time to time over the interval.

As you know, we obtained certain fragmentary plans, and from measurements taken at the building reconstructed
842 the structural plans of the buildings as far as we would to determine the sufficiency of the original design.

As you may remember, in our letter to you of September 16, 1915, we say, 'The question of adequacy of the original design will be a governing factor if we are to definitely pass upon the sufficiency of the structure.'

The theoretical result of this investigation was most unsatisfactory; but observation of the action of this structure under the stress thrown on it by the occupancy of the building gave no indications, that we were able to discover, of dangerous strains.

We have taken some time to continue these observations in order to supplement our theoretical investigations with the practical ones, so that our judgment would be based on both points of view.

Herewith our report covering this matter.

Report on the Investigation of the Supporting Structure of the Auditorium Space in the Auditorium Building, Chicago.

The original drawings available were fragmentary, consisting of plans, elevations and sections and some few structural details. No general steel framing plans nor column schedules were obtainable. The only original steel drawings of completely detailed and designed trusses were the drawings of the banquet hall trusses 'V' and 'T'. These were indicated as pin connected trusses; whereas field inspection shows them to be riveted gusset plate connected trusses with altered types of the individual members,—which would indi-

cate that even the fragmentary plans which are available were not carried out in fabricating the building.

The determination of the structural parts from original drawings was on this account and for other reasons in general vague and had to be supplemented by field determinations, which, in view of the fact that in most places this could only be done by cutting in access, necessarily had to be of a very limited nature, and was by no means sufficiently
843 broad in scope to give us more than a probability on which to base our conclusions.

Connections of structural parts were for the most part the most difficult of access, and consequently have not been covered by this investigation.

The drawings which we have made from the data in hand include:

Small scale longitudinal and cross sections,
The eighth floor and auditorium roof plan,
Second floor plan,
Floor and roof sections,
Cast iron column schedule.

We attach hereto detailed results of the investigations as a matter of record.

We understand that a large part of the metal used is iron, and in making our investigations have taken this into account.

On the basis of the present City Building Ordinance, broadly speaking, the investigation indicates a general deficiency; but this deficiency is particularly apparent in design of the trusses and columns.

These trusses, on the basis of the loading which we have used, are overstressed, in some cases as high as forty per cent. The full limit of ordinance loading for the columns is required to support the dead load, making whatever live load they receive a factor of overstressing.

On the basis of this showing, were all other factors ignored, the building is overloaded and ought not to be used until strengthened.

There are two other factors however which bear on this matter and which must be taken into consideration before such a conclusion can be reached.

In the first place, we must realize that the requirements for a building ordinance are intended to be conservative; and in the second place, the action of a structure under full loading cannot be ignored as against the theoretical calcula-

tions, particularly in the case of trusses, where overstressing, if it reaches a point approaching destruction, should show itself by action on the enveloping material.

844 While this would not apply quite so definitely, in the case of cast iron columns, this is somewhat offset by the fact that the columns are figured with a larger factor of safety.

We have taken all those things into consideration in arriving at our conclusion which, stated in a few words, is—

The building is reasonably safe for temporary occupancy. It should be watched vigilantly, particularly under maximum loading conditions, and unusual loading should not be thrown upon it if it can be avoided.

Should your arrangements for the use of this property contemplate any long continuance of its present occupation, a scheme of reinforcement should be studied out and put into effect as far as practicable; any postponement of such action should be accompanied with care in the use of the property and with vigilance during such use, and points of overstress that make themselves manifest under such scrutiny should be promptly corrected.

In regard to this question of overloading, we would refer you to the accompanying drawings and detailed statements. We attach pages 1 to 11 of 'Summary of Calculations and Investigations.' We have a mass of drawings, notes, calculating sheets (of which this is a summary) in our files available for further investigation at any time that you may direct.

Our final conclusions reflect the observation of action of the structure under occupancy during two complete opera seasons, during which time there have been no breaks, deformations, nor destructive deflections.

Respectfully submitted,"

Following the text of Plaintiff's Exhibit 79 as aforesaid, were certain blue prints including the blue prints theretofore offered and received in evidence as Plaintiff's Exhibits 71, 72, 73, 74, and 75.

845 Thereupon Mr. Miller, on behalf of Roswell B. Mason, Guardian ad Litem, and such other defendants as may wish to avail themselves thereof, offered in evidence certain instruments which were received in evidence and marked respectively Mason Exhibits 3, 4 and 6, of which he desired certain portions to be incorporated in the record as follows:

MASON EXHIBIT 3. Lease from Chicago Auditorium Association to Chicago Opera Association, dated September 1, 1907, demising to the lessee the Auditorium Theatre together with all box office, cloak rooms, etc., "and being the same premises" heretofore occupied by the lessee under lease expiring August 31, 1917, to have and to hold for 5 years from September 1, 1917 to August 31, 1922, subject:

"however, to the right of the Lessor to terminate this lease after August 31, 1919, because of its termination and actual undertaking to erect an entirely new building upon the ground covered by the present Auditorium Building and the razing of the present building for that purpose."

Notice of such termination is to be given by the landlord. The lessee covenants for itself and its subtenants to use the premises only for first class amusement, theatrical, musical, vaudeville, operatic, and entertainment purposes, and for meetings for religious services. It is contemplated that the lessee may, at its option, make changes, alterations, and additions but not unless first approved in writing by the lessor,

and the lessee agrees at the termination of the lease to
846 return the premises and properties in as good condition

as when received, loss by fire and ordinary wear and tear excepted. The lessee shall not make changes or alterations in any of the permanent walls or partitions without first obtaining the written consent of the lessor. In making any changes or alterations the lessee shall not do any work that will cause injury to or weaken any other portion of the building. That the lessee knows the condition of the demised premises and properties; that the same are in good repair and the lessee will keep them in good repair and free and clear from all liens and charges, and will keep the premises in a good and tenantable condition in conformity with all lawful requirements, except in case of fire or accident as aforesaid. All legal, health, and police regulations shall be complied with by the lessee and all improvements to be made shall conform to the lawful requirements of all public authorities:

"But all changes and alterations required by any law, ordinance or lawful authority to be made in any portion of the structural part of said demised premises shall be made by the lessor, at the lessor's expense, except as hereinafter specified, and the lessor, at its own expense, shall keep the roof of said premises in good repair, meaning by said term "structural', the roof, foundations, girders, beams, all walls,

floors, stairways, exits, passageways, entrances and the stage (and meaning by said term 'stage', the raised platform on which theatrical performances are exhibited). But the lessor shall not be required to make any changes, additions or alterations of any kind whatsoever that may be required by the public authorities as a result of alterations or additions made by the lessee."

847 The lessee will not permit the premises to remain vacant or unoccupied for more than 100 days in each year, except by written consent. All alterations and additions and all replacement of the demised personal property shall remain for the benefit of the lessor unless otherwise agreed in writing. The lessor will supply sufficient electric current for which the lessee will pay on the first day of each month for service during the preceding month. The price to be paid for said electric current by the lessee:

"shall be equal to but shall not exceed the minimum price charged at the time by the Commonwealth Edison Company, or its successor or successors, for similar electric lighting."

Said lease is signed for the lessor by R. Floyd Clinch, President, attested by A. W. Sawyer, Secretary, and on behalf of the lessee by Judson F. Stone, President, attested by Herbert M. Johnson, Secretary.

Exhibit MASON EXHIBIT 4. Memorandum of agreement dated June 28, 1922, between the "owner" Chicago Auditorium Association, and the "lessee" Civic Opera Association of Chicago, recites that the lessee has accepted an assignment of the lease from the owner to Chicago Opera Association expiring August 31, 1922, and desires to lease the theatre for 5 years from September 1, 1922, and that Samuel Insull, President of the lessee, is about to leave the city and time is wanted to prepare and execute a formal lease, but the

848 parties desire to enter into an informal memorandum of agreement; therefore, the owner agrees to lease to the lessee (and the lessee agrees to enter into such lease) the Auditorium Theatre and appurtenances for 5 years from September 1, 1922 to August 31, 1927, at $115,000 per annum payable monthly in advance.

"It is understood and agreed that said formal and final lease shall contain a provision permitting the Owner to cancel the lease in the event that it shall make a sale of the property or desire to wreck the building thereon for the purpose of the construction of a new building by giving notice in any

year during the term, not later than January 2nd of any year, and with the understanding that any Opera Season in progress at the time of such notice shall be completed and the Lessee shall not be required to vacate until the completion of the Opera Season in progress. In the event of such notice by Owner, Lessee shall pay the prescribed rental until the completion of the Opera Season in progress and until it shall vacate the premises."

Said memorandum of agreement is signed on behalf of the Chicago Auditorium Association by R. Floyd Clinch, President, and on behalf of the Civic Opera Association by Samuel Insull, President.

MASON EXHIBIT 5. Lease from Chicago Auditorium Association to Home Drug Company, dated January 17, 1922, of the stores Nos. 443 and 445 South Wabash Avenue, northeast corner of Congress Street and Wabash Avenue, 849 from May 1, 1922 to April 30, 1927, unless sooner terminated as hereinafter provided. No representations except such as are herein contained have been made to the lessee respecting the condition of the premises and the taking of possession by the lessee shall be conclusive evidence that the premises were in good and satisfactory condition when possession was so taken; and the lessee will, at the termination of the lease, return the premises in as good condition as when received, loss by fire and ordinary wear excepted. Lessee agrees to pay on the first of each month the sum of 6c per kilowatt hour of electric current consumed in the premises for the previous month:

"It is mutually agreed that the lessor and his assigns shall have the right to terminate the term hereby demised absolutely on six months notice in any year if the lessor shall desire to remodel, remove, or admonish the said building, or shall desire to sell the said building, or the land thereunder or to make a ground lease, provided that the lessor shall first give to the lessee six months notice.

"It is further agreed that in the event of the sale by the lessor of said building or of the land thereunder, or of the making of a ground lease of said land the purchaser at said sale or the lessee of said ground lease, shall in like manner have the right to terminate the term hereby demised on six months notice."

Exhibit 850 MASON EXHIBIT 6. Lease from Chicago Auditorium Association to Greene's, Limited, dated May 1, 1922, of the store and basement at No. 426 South Michigan Avenue, in the Auditorium Building, from May 1, 1922 to April 30, 1932, unless the term be sooner terminated as hereinafter provided. Lessee will occupy said premises for a salesroom for millinery, etc., and for no other purpose, and will keep the premises in good repair. No representations except as contained herein have been made to the lessee respecting the condition of the premises. Taking possession shall be conclusive evidence against the lessee that the premises are in good condition and the lessee will return them in as good condition as when received, loss by fire and ordinary wear excepted:

"It is mutually agreed that the lessor and its assigns shall have the right to terminate the term hereby demised absolutely on the thirtieth day of April in any year, if the lessor shall enter into a bona fide valid contract to remove or demolish the said building or to sell the said building or the land thereunder, or to make a ground lease of said land, or to remodel the Michigan Avenue side of said building, provided the lessor shall first give to the lessee on or before February 1st, in the year in which said lease is to be terminated a written notice of the lessor's intention to terminate said lease for any of the reasons above specified, and provided also, that if the said term shall be terminated under this paragraph prior to the thirtieth day of April, 1927, the lessor shall have paid to the lessee the sum required to be paid under the next preceding paragraph of this lease; the rate of rent herein stipulated being the consideration for this agreement. It is further agreed that in the event of the sale by the lessor of said building or of the land thereunder, or the making of a ground lease of said land, the purchaser at said sale, or the lessee in said ground lease, shall in like manner have the
851 right to terminate the terms hereby demised on the thirtieth day of April in any year upon giving to the lessee written notice of such termination prior to the first day of February in the same year."

"It is further understood and agreed that in the event of the remodeling of said building or the demolishing of said building and the construction of a new building on the site thereof at any time during the term of this lease, the lessor shall provide for the lessee in said remodeled building or said new building space for the business

of lessee on the first floor of said remodeled or new building on the Michigan Avenue side thereof, of a like amount of street frontage and containing the same number of square feet, and upon the same terms and conditions as the space originally leased, provided, however, that in case the said space in said remodeled or new building shall be offered by the lessor to the lessee after the 1st day of May, 1930, the lessee shall have the right to refuse to accept said space and the lessee shall be under no further obligations under the within lease. In the event of the demolishing or remodeling of said building and the substitution of space for lessee in said new or remodeled building as hereinbefore provided, the lessor shall, at its own expense, remove the fixtures and equipment of lessee from the space herein demised to the space to be occupied by the lessee in said new or remodeled building as aforesaid."

"The lessor also agrees to furnish to the lessee, and the lessee agrees to purchase from the lessor such electric current as it may require in the demised premises and to pay the lessor for such electric current as measured by meter at the rate of nine cents (9c) per kilowatt, as and when billed monthly."

"The rent hereby reserved is based in part upon the general property taxes which were levied upon the land and the building thereon, in which said demised premises are located, for the calendar year 1921; said taxes aggregating One Hundred Thirty-Eight Thousand Five Hundred and Thirty-One Dollars ($138,531.00). It is therefore agreed that in the event the amount of the general property taxes levied on said
852 land and building for any one of the calendar years beginning 1927 and ending 1931, both inclusive, shall be greater than $138,531.00, then and in that event the monthly installments of rent due hereunder upon the first days of the twelve consecutive months beginning with the month of May next following each year in which said taxes shall exceed said sum of $138,531.00 shall be increased by one-twelfth of five per cent of the amount that said taxes levied for the preceding calendar year shall exceed said sum of $138,531.00, but in no event shall said monthly increase exceed the sum of Two Hundred Fifty Dollars ($250.00)."

853 WILLIAM M. KNIGHT, a witness on behalf of Plaintiff, in rebuttal, testified as follows:

Direct Examination.

I live at LaGrange, Illinois, and am general superintendent for Aldis & Company. I have ben so employed approximately 25 years. The Monadnock Building is one of the buildings managed by Aldis & Company. My duties in connection with that building are to supervise the operation and maintenance of the building. I have had those duties upwards of thirty years. The Monadnock building consists of two parts, ordinarily referred to as the north and south halves, erected at different times. The building in those two halves extends the full length of the block between Jackson and Van Buren streets from north to south, and from Dearborn to Federal streets east and west. That makes the building about 400 feet in length and about 67 feet in width. It is about 215 feet high and consists of 16 or 17 stories. The north half was built in 1891 and the south half in 1893. The north half is all wall-bearing construction and the south half is a modified form of wall-bearing with steel-bearing interior walls and in some parts steel exterior columns. The columns in the north half are steel columns. There are a few cast iron columns in that building to carry some localized loads. They are located in the south half of the building, about 40 feet from the west wall of the building. There were originally eight of them. Some have been removed. I think there are still two remaining. For several years past there have been only two. The building stands on what is known as a gril-
854 lage foundation composed of steel beams bedded in concrete. The steel beams rest on railroad iron, and the railroad iron on concrete, the concrete on clay. That is, as I understand it, the upper blue clay, approximately 14 or 15 feet below the city grade.

That building has settled, as a whole, with a few exceptions, fairly evenly; such exceptions being where the cross-bearing walls occur, and where local conditions exist, such as the lateral of the Illinois Tunnel which has been driven into Dearborn street from the east side. It is a little difficult to determine which is the extreme settlement of the building at any point, owing to change in bench marks; but I should say, to the best of my judgment, that it was possibly eight inches.

The greatest difference in settlement between any two points in that building is possibly six inches. The points where that occurs are on the cross-bearing walls, the west being rather lower than the east end of those walls. There is one of those walls located 50 feet south of Jackson, another 100 feet, another 200 feet south of Jackson, and another 300 feet south of Jackson. They run through the building from east to west with a break in them for passage through the corridors, and occasional wall openings for doors. The building settled more in those points. The cross-bearing walls form part of the exterior walls, and the settlement is along the line east and west fairly evenly on those cross-bearing walls; some indication of more settlement at the extreme east and west ends than in the middle.

The Illinois Tunnel does not pass into the building. It projects into Dearborn Street from the east side of the street.

It comes within about 40 feet to the Monadnock Build-
855 ing. There was some settlement in the Monadnock Building at that point. It occurred about 220 feet south of Jackson, as indicated by fractures of terra cotta in the exterior of the building. The settlement there would indicate about, possibly, 8 inches from the original levels. I should say that was about the greatest settlement at any other part of the building from the original levels. This difference of possibly six inches in the extent of settlement between any two points would be from the middle of the south half to the center of the building. The settlement generally is greater in the north half of the building, which is a heavier construction. I haven't the exact figures about the greatest settlement in the north half of the building, but it is substantially between 4 or 5 inches and 8 inches. The north half of the building settled fairly evenly. It is not uneven in settlement, more I think, than four inches at any point.

There have been three periods during the life of the building during which substantial settlements have gone on. The first settlement, of course, would come fairly soon after the building was constructed. Then we found that our sidewalk was getting out of level, and at three periods we had to raise them, or crown the sidewalk. One of these periods was about 1916, and one, I think, about 1907. There was a third period, but it was not as extensive as the other two. In 1907 we found we had a place on the sidewalk at the building line about, together with the raising, about 11 inches. We had to make up about 11 inches. That included both the sinking

that had gone on and the increase in the level of the side-
856 walk; it also had to make up the effect of wear and tear.

The next period was 1916. That was the last occasion when we substantially went over the entire settlement. That 11 inches was the last turn. In the earlier instances my recollection is it was a raise of less than six inches, but that would be practically included in the 11 inches, because of the change in grades.

Between 1907 and 1916 I have no particular record of actual levels, but from general observation, the building did sink slightly in a general uniform manner. We consider that at one time the level of the building was affected by something in the nature of an earthquake or earth tremor. I think that was in 1916 or thereabouts; the time the terra cotta fracture occurred. The distance between the exterior walls in the north half of the building and the nearest line of interior columns to the exterior walls is approximately 20 feet, between the centers. In the south half of the building it is slightly more than that. The floor and the elevator shaft was slightly lower on the east side of the corridor. It was never determined as to whether that was an original fault or whether it was a settlement. On one floor, in 20 feet, that is to say, from the first interior line of columns to the edge of the elevator shaft, the difference in level is one-half inch, approximately. The difference in level, between that edge of the elevator shaft and the exterior wall would approximate an inch; possibly about 13/16 of an inch. That would be from the edge of the elevator shaft, which is substantially the north and south axis of the building, to the interior pier or column. The

total difference between the exterior wall and edge of the
857 elevator shaft, which is the axis of the building, would be about 13/16 of an inch. There may be possibly a few places where it was a little more or less. There are not to my knowledge, any places where it was two inches.

The grillage of the foundations under the Monadnock Building extend toward the west from the exterior surface of the west wall about eleven feet according to the best drawings that we have, the original drawing. There is an excavation going on for the Union League Club to the west of the Monadnock Building. Assuming that the retaining wall of the Union League Club will be about six feet from the east lot line of the Union League Club, then Federal street, being 40 feet, would mean 34 feet to the west lot line of the Monadnock Building. The caisson foundations for the Union League

Club would be possibly three feet under Federal street; that is, east from the lot line of the Union League Club. The nearest point at which the caissons for the Union League Club would approach the Monadnock Building exterior west wall would be 37 feet but there is some of the grillage of the Monadnock Building which extends under Federal street eleven feet, so that the nearest point, then, of the caissons of the Union League Club to any part of the foundation of the Monadnock Building would be approximately 26 feet.

The Standard Club is excavating for a building across Dearborn street from the Monadnock Building. The caissons are all in place. Dearborn street is 80 feet wide. Assuming that the caissons project three feet into Dearborn street,
858 they would come to within 77 feet of the Monadnock Building. Early last fall we instructed Holabird & Roche to have the Chicago Guarantee Survey Company set levels and plumbs on the Monadnock Building, and consulted with them as to the possible effect on the Monadnock Building of the building of the Union League Club; and it was extended later to the Standard Club, at my suggestion. I conferred with Mr. Schless, who was the representative of Holabird & Roche on the field. He was working probably under the immediate direction of Mr. Carroll, who is under the direction of Mr. Renwick. He is general superintendent for Holabird & Roche. Mr. Schless went to Mr. Barbour, the architect's superintendent for the Standard Club, and had a number of conferences, and went down into the excavations and made a number of observations on the caissons. The first observations were made by Mr. Schless. Subsequently, owing to an objection on the part of the architects for the Union League Club, the observation were made in another manner. At my personal suggestion Holabird & Roche were asked to give a general view on the subject, and the possible cost of putting caissons under the Monadnock Building. They did so. They reported that it was possible to do so and that the expense would be very considerable, approaching, as I remember it, including certain things, a million and a half. They suggested that while we were putting caissons under the building it would be possible to construct a deep basement which, of course, would mean a floor, in addition to the caissons, and the excavation for a sub-basement. There were not any
859 definite plans or estimates ever made for that work, not to my knowledge.

Mr. Fisher: Yesterday in colloquy between myself and

Mr. Cooper, he stated that no plans had been made, because he said it was decided not to go on with the work. I would like to ask Mr. Cooper whether it will be conceded that no plans were ever made at any time?

Mr. Cooper: As I understand the facts, Mr. Renwick testified on his cross-examination, when we were taking his deposition, that there were plans under preparation. Mr. Fisher asked if those plans could be seen. Mr. Renwick said they could. I think he said it reluctantly, as the deposition shows. Later on, as I understand it, Mr. Ritter went up to the office of Holabird & Roche and asked to see them and at that time was told there had been no complete plans; that the only things there were were some sketches and some discussion, I think, with Mr. Roettinger of the contracting company. My understanding is that those are the facts.

Mr. Fisher: I think that substantially covers it. My understanding is there was nothing that really could be called plans.

Mr. Cooper: Not finished plans.

Mr. Fisher: Well, no plans that our witnesses could take and analyze.

Mr. Cooper: No, there were not.

860 *Cross-Examination.*

I am not a surveyor. These figures I have given as to settlement are figures I have taken from time to time from surveys of the Chicago Guarantee Survey Company. They have made not less, I think, than five or six surveys in different periods. The earliest survey for levels that I know of would be about the year 1898. Recently there have been about thirty sets of levels taken. Down to the time this construction was started, I should think about six sets of levels had been taken at uneven intervals. There was one set made in 1907, another in 1916. I haven't the exact dates of the others. The occasion for having them made was the question of sidewalk levels, disturbance, fall of terra cotta, excavations in the neighborhood. There was a change of grade of sidewalk in 1907 as I recall it. This terra cotta fell off about 200 feet south of Jackson street on the east side of the building, outside. It was the terra cotta face on the piers between the second and third floors, and some higher up. As I recall it, there were a number of blocks, which are possibly two feet high and, in a general way, two feet square. Perhaps there were

fifteen or twenty of them fractured and fell and were taken down, because they were dangerous. This terra cotta was in the south half of the building, that has the modified bearing walls. In the part that has the ordinary bearing walls, put in in 1891, no terra cotta fell off but there have been brick fractures. There is no terra cotta on that building.

861 The levels showed the greatest amount of settlement of the building fairly early in its history. I have been there rather more than thirty years. The first time they ran levels was about 1898 or 1900. I can't tell how much settlement took place between that set of levels and the 1907 set of levels. This is a matter of recollection only. I think it was about two inches in some parts from general observation, I should say that most of this settlement took place after 1907. I should say that the greatest settlement had taken place in the latter half of the life of the building, since 1907, I should put it.

I have not had any tests of that building made by engineers to ascertain its stability, except from time to time we have consulted them on a number of matters. They told me that it was safe.

At this point Mr. Hurlbut offered in evidence two original documents, of which photostatic copies were substituted with lease to withdraw the originals.

(Said documents were received in evidence on behalf of the defendants represented by Messrs. King, Brower & Hurlbut, and were marked respectively Chapin Exhibits 2 and 3).

862 LOUIS E. RITTER recalled as a witness on behalf of Plaintiff in rebuttal, testified as follows:

Direct Examination.

In my direct examination I stated that I had not been able to work out any plans for the strengthening of the foundations of the Chicago Auditorium Building or putting caissons under them, and that I knew of no plan. I have heard all the testimony given in this case since that time. The testimony of the various engineers or architects that has been given in this case has not presented or suggested any plan which in my judgment would safely accomplish that result. I testified I knew of no plan of putting this building on caissons. I have read the testimony of these gentlemen, whose professional

standing I thoroughly recognize, but it does not change my opinion, because nothing has been said or brought out that would show such a plan or method definitely. I have had some little experience in the matter of shoring and removing foundations and altering buildings in the past year, and that experience has taught me a number of things. In the first place, I have learned from it that an aleration job on an existing building which involves shoring and the taking out of foundations, the taking out of walls, is very often a much more important engineering design than the design of a new building, the design of a skyscraper, for the simple reason that the forces which are to be considered, the loads which have to be taken into account, are indefinite, unknown, and the results are unknown. That is one of the things I learned. Another thing I learned was that I never wanted to take chances with another man's property. A third thing was that in a shoring job it was absolutely necessary to take
863 it as an engineering proposition, and to formulate a definite plan of the whole operation from beginning to end before entering into the operation or stating that it can be accomplished. By such a plan I mean a definite determination of the loads involved, a definite plan showing the local conditions, size of foundations, and al lthat sort of thing, and the disposition of the shoring, and the program of operation.

I have made some little study of the Auditorium case before I gave this testimony, and since, I will say; and I have noted two or three points that I would like to speak of as an illustration of what I call the obstacles. One is the difficulty of finding sufficient ground area, to put this new cribbing on. I will give you a concrete example. Take the Wabash avenue front of the office building. There you have a building that is about 40 feet wide from east to west. The east wall forms the west wall of the Auditorium, which is a 10-story building, 142 feet above grade. That is divided by an interior column half way in between the walls. The piers on Wabash avenue are, I believe, 17 feet apart on centers. Now, take the case of shoring, that outside pier and the columns, say the wall back of it. I might say here that in my opinion the shoring operations of the Auditorium should be taken up as a whole. I do not believe in shoring up part of it, because I believe the digging of those caissons is apt to produce movements which in its present state we feel would be dangerous, and for that reason we think the entire building should be under control

before any excavation of any kind is done, and by being
864 under control I mean all parts being shored.

The load on the exterior pier on Wabash avenue is about 750,000 pounds, taking the figures that have been put into the evidence here; that the wall is nine feet, the foundation is nine feet, and the load per square foot was 2¼ tons. And the distance between piers is 17 feet, that would give about 750,000 pounds. It may be more or less, but that is close enough for our purpose. And in the same way the load of the interior column would be about 500,000 pounds. We found by experience in the past, (and I can state one specific case, the changing of the foundations in the Fair Building) that a load of 5000 pounds per square foot was about as much as we would want to use for cribbing. In the case of The Fair that is about what was used, and the settlements ran six to eight inches of the cribbing that it had to be screwed up. In this case we would not dare exceed that load because the old Fair foundations were on what we call the secondary hard pan, which is better than the clay on which the Auditorium foundations are now. I believe that has all been testified to.

Now, about those outside footings on that wall nine feet wide, the footings under the center column is about 10 feet square. I do not think I am very far off, because the wall checks up with those same figures, and that has been testified to. That gives you a distance of 9½ feet between the east edge of the wall footing and the west edge of that interior pier footing. I think it is customary among all shoring men
in all shoring operations to set the cribbing down as far
865 as the bottom of the existing foundations which are to be taken out. That east cribbing for the wall and the west cribbing for the column is in pairs, straddles the foundation that is to be taken out, so the east cribbing for the wall and the west cribbing for the column would come into this space of 9½ feet. The column load is 500,000 pounds. With 5000 pounds on the soil you would want 100 square feet of cribbing for the interior cribbing. That means 50 feet on one side. Similarly, for the wall pier, 750,000 pounds, you would want about 150 feet. One-half of that is 75. That means you have an area for cribbing in between the edges of those two foundations of 50 plus 75, about 125 feet. The width of that cribbing is limited by the difference between the footings, 9½ feet. Divide 125 feet, the total square feet you have to have, by that, and it gives you the dimensions in the other direction of about thirteen feet. This column which I have taken is re-

peated about seven or eight times, I think. There are four or five or six or seven or eight rows of these columns on Wabash, and corresponding piers. This means this is all shored up and this cribbing put in. You have an aisle of about four feet to get your material in, which is impossible. That is one of the points, not a high point, but just incidental.

Another thing that was talked about the other day was to take these castiron columns and put a collar around them, lift them up and hold them there. Let's go into the details. I remember at The Fair we had the most advantageous conditions for taking care of a column. We had steel columns that permitted us to design brackets made of plates and angles and make the necessary connections to the columns
866 by cutting out a lot of rivets, and we had plenty of room to put it in. Even that caused a great deal of discussion and some planning and designing before we got a form that everybody was agreeable to. Take the case of the column I spoke about in the tower basement the other day, that water-bearing column. That column, you remember, was 18 inches in diameter, 1½ inch metal. The load on the column was something over one million pounds. I said the effective length of that column at that time was 92 inches. You are going to put a collar on there. That means you are going to put a collar on there in such a way that load of one million pounds is transmitted from the column on to that collar, and from there transmitted to the beams that carry it to the shoring material. The only way that load could be transmitted to the collar would be by means of bolts. The most economical, effective, bolt in this case would be a two-inch bolt. The shearing value of the bolt would be the same as the bearing value. The value of that bolt would be about 30,000 pounds. It would take about 35 of them. You would have to secure that column to that collar by 35 bolts. It means that in your column, by the very best arrangement, the metal of it would be reduced by about 30 per cent. The column would look like a sieve in the top, just to illustrate that these statements were made without due consideration.

I will take one more case, the case of the tower. That tower is on a raft that has been testified to, about 100 feet by 67 feet. The tower itself is about 40 by 68 or 70, somewhere around there. Anyway, this raft extends from the
867 sides of the tower in all directions a distance of about 15 feet. That means that in shoring the walls and in-

terior columns of that tower, it would all be shored on that existing raft. I cannot conceive of any way of going outside of it. Now the operation of putting down the caissons. Just assume it all to be shored. You have not got room to shore it, but assume in some way it is shored on this raft. The operation of shoring means cutting the area of this raft by a certain percentage, depending on the number of caissons it is designed to put in at one time. That raft is already overloaded, as has been testified to; an original load of 4500 pounds a square foot, and presumably 5000 pounds per square foot is the present load. You have a foundation of this kind with that load on, and you are starting to undermine it and put in caissons. If you screw fast enough you can maintain the level of it with grade, but I should say cutting into that overloaded soil there, with no chance of loading on the outside, would be a hazardous operation.

Those are the three points I mentioned. There may be more. My own opinion is that it is not a practical proposition. The main point I want to bring out again, I want to say it again, that no man has a right to make a statement that this thing can be done unless he has a definite plan showing how it can be done in every detail. This is not a matter of general statement but a summation of detail in an operation.

868 *Cross-Examination.*

I did not mean to put it that this caisson operation can't be done. I said as far as I know, as far as I have any knowledge; that I know of no plan by which caissons could be put under the Auditorium. That is the way I want to put it; I have no plan, I know of no method, no definite known method, to my own knowledge. I have heard Mr. Renwick and Mr. Thielbar express the opposite opinion; but I think I stated in the beginning all we care was to see that opinion put beyond the border of mere language, in the shape of drawings or specifications, something that we could talk about or look into. No doubt caisson operations involving shoring have been undertaken in which all the details have not been worked out on paper. There have been such jobs. That does not change my statement, though, about what I think ought to be done, and especially as applying to this Auditorium.

The cribbing is what holds the needle bars. The needle bars could be put in so that they would all be above the bot-

tom of the existing foundation. Most decidedly, yes. That has nothing to do with my point that I have been talking about. In putting in the needle bars, I should say it would be necessary to support the whole pier at one time. I would not take advantage of the existing footing to carry all or part of the load during this operation. I don't think other men would do so if they would look at these footings first and see what they look like. They would appreciate the difficulty of cutting caissons through that footing. They would want to carry it out as a whole. That hard stone. I tried to cut through some of it the other day just to satisfy myself on
869 the point. I think Mr. Mueller would prefer to take the footings out one stone at a time rather than cut that hole through. That is my practical judgment. It has been done on caisson work. Most decidedly it is possible to do it over there. You have a pier going down to a wide base, of a pyramidal shape. I have never seen a hole dug through a pier like that. They might leave a part of that pyramidal base there and go down under with only enough of a hole to get into the caisson with a cold chisel and all that sort of thing you can do anything of that kind. I am not criticizing Mr. Thielbar if that were done, the portion of the base of this pyramid which was not cut away would continue to support the weight above. If it did I don't know that the area of the shoring would be correspondingly less. You have two different levels to shore up from. That is a practical detail. But I have mentioned three points. I just picked out three points. I can go over there and probably get a hundred if I have time. One of the points was that I never wanted to take a chance with another man's property. I would not take a chance.

In my opinion it would be necessary to shore, for instance along the Wabash avenue front, the interior columns at the same time I was working on the exterior piers. That would be my judgment. That is the way I would do it, yes. You understood me correctly that you ought to shore the entire building. On that I differ with these other people, yes. I do know that in shoring buildings, for instance the Marquette, they sometimes put a caisson under one column and wouldn't even shore the adjacent pier. Probably I am more con-
870 servative. Undoubtedly there have been a great many buildings in Chicago where they did not shore the entire building at once; more that way than otherwise; they delight in taking chances.

Redirect Examination.

I don't know of any place where any such operation has been performed as those which Mr. Cooper has been asking me about, where there has been any such settlement as occurred in the Chicago Auditorium. In this operation of cutting through the existing foundation and the shoring of those foundations, when you start to excavate for your caissons, you have to excavate down to the bottom before you can fill the caisson. You would have the vacant space, the hole in this soft clay, all the way down to bed rock filled with nothing but air. All the lateral pressure would be forcing that hole in from all sides. That is why I gave that illustration.

Recross Examination.

On Wabash avenue, where it is 15 foot 6 inches, with 750,000 pounds weight, the size of the caisson would depend on the mixture of concrete you used. The present ordinance provides for a load of 400 pounds in the concrete per square inch. That is the highest they have in the present ordinance. That ordinance has been amended several times. It has not been published yet, to my knowledge, but I believe they
871 will allow as high as 580 or 600 pounds per square inch. That would be 72,000 pounds a square foot. Now your load is 750,000 pounds. That means you would have to have a caisson containing ten square feet, which would mean a round caisson of about four feet. That is as close as they would want to make it, 3½ to 4 feet. At one time they tried 3 foot caissons, but I think 4 feet is about what they would use. They could not afford to waste the concrete by adding a foot or two. The caisson would be designed exactly according to the load it carries and to the concrete that it is made of, the relation of sand and cement and so on.

872 CHARLES E. FOX, recalled as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination.

I have heard the testimony given in this case by Mr. Renwick and Mr. Mueller and Mr. Thielbar. In that testimony there is nowhere in my judgment any suggestion or plan of

operation that would in my opinion permit of the construction of caissons under the foundations of the Chicago Auditorium Building in a safe manner. I don't think that any of the testimony which was given was based on an engineering knowledge of the conditions as they exist in the Auditorium. I have worked over this problem for ten years, and sometime of each month during that period. I have had my own engineers, and I have had Mr. Ritter, and I have had my own calculations confronting me in an effort to design a method that would be feasible in installing caissons under this building, and I have heard nothing from any of these witnesses that suggested they had faced the problems which are the technical difficulties and impossibilities as I see them in this problem.

In the first place, the existing soil load is beyond the bearing capacity of the soil in its initial state. We know from the testimony that 4500 pounds was designed to be put on the soil. We know that that amount was increased. How much, it does not appear. We know there has been tremendous settlement, and we know that the building must be supported, when these foundations are removed, in order to replace them with
873 caissons. We also know when we lay out these cribs that are to form the foundation, that is, support the load during this construction, that we get prohibitive loads on the soil. Our foundations start under the pressure of the screws and, assuming a certain bearing capacity will support the load in a quiescent state, it takes greater bearing capacity when you start the screwing operation to take the load off the foundation. That is one of the fundamental difficulties. The only testimony I heard that bore at all close to the problem was Mr. Thielbar's. He said he had made no figures. He stated also that figures were absolutely necessary, and close figures were necessary, before he could determine which of these caissons he would dig first or together, and yet he denied he had made any figures to form the supporting data for his opinion that it could be done. I do not believe that any man who did not make any figures in connection with this job is competent to express any kind of an opinion. He also stated that he had never installed caissons under a building with pyramidal foundations. He testified he had installed caissons under buildings supported with floating foundations in the form of rafts, cutting a hole through the foundation and using the rest of the foundation to support his cribbing. He testified he did not know of anyone who had ever cut through

or taken out pyramidal foundations of this nature to install caissons. In 35 years experience I have never seen it done. In an equal length of time, experience extending over an equal length of time, Mr. Ritter has never seen it done. Any-

body who sets up to give an engineering opinion based
874 on a chance is not talking engineering, he is talking building inspection or construction.

In regard to putting a collar around these cast iron columns, as a layman, I would say it could be done, not having made figures. The boring of the holes for the bolts necessary to support those collars to carry the load would have the effect of weakening it. That is not the place where I would look for the prohibitive element in lowering that building. My expectation would be we might solve the question of supporting a collar on the column without destroying it. We might possibly provide sufficient lifting power so that it could be lowered, but when a beam has established an angularity with the wall over a term of 35 years, that crack has filled with dirt and debris which has fallen down from the masonry, and it is closed to all purposes as though cemented in that angular position. If you start and lower that, you find a wedging action that will have an end result of pressing that wall out unless you have cleared the end of it first. If it abuts a beam it will press it over to that extent. That is where I would expect to find trouble. I have had that exact trouble in the case of shoring where I have tried to level floors, and I have found I could not do it. On the advice of Mr. Sheeler, one of the big shorers, I had to desist because it was a practical impossibility to establish all the clearances necessary to get the column back in position. I left it up four or five inches above where it belonged because I couldn't get it down with the most expert men I could hire to do the work.

875 *Cross-Examination.*

Engineers don't take chances, not if they are engineers; they do not figure to take chances, no.

The attention of the witness was called to the following language in Plaintiff's Exhibit 79, the report of Marshall & Fox, dated April 10, 1917:

"We have taken all those things into consideration in arriving at our conclusion which, stated in a few words is, the building is reasonably safe for temporary occupancy."

Q. Did you take any chance when you made that recommendation?

A. Not an engineering chance. That is a business recommendation.

Q. Is this an engineering or business report?

A. This is a business report.

Q. Then it is all wrong from an engineering standpoint, is it?

A. Oh, no.

Q. Which is it?

A. We have taken it into consideration.

Q. Yes?

A. Yes.

Q. Were you reporting as a director of the Auditorium Association or as a member of Marshall & Fox?

A. Yes, I was advising them as a business adviser.

Q. They didn't ask you for business information?

A. That is about 90 per cent what I was asked.

Q. What were you asked?

A. To tell them the thing for them to do.

876 Q. From an engineering standpoint?

A. They didn't say from an engineering standpoint. They asked, "What is the thing to do?"

Q. They asked you because you were an architect?

A. I don't know. Because they wanted to know. And I told them.

Q. Do you take business chances in your correspondence as architect?

A. Business?

Q. Yes.

A. The same chance every business man takes every time he carries on a business transaction.

Q. Was this statement: "The building is reasonably safe for temporary occupancy," unreliable from a business standpoint?

A. It was good from a business standpoint.

Q. How about from an architectural standpoint?

A. No relation to architecture.

Q. You put this out entirely to advise the Auditorium Association, from a business standpoint, what the nature of the stresses was, is that right?

A. No.

Q. Why?

A. I put that forward as advice to the directors of the Auditorium Association as to what they ought to do.

Q. It says, "structural investigation of the Chicago Auditorium Building."

A. That is all right. It applies definitely and technically, what it pretends to do.

Q. Technically, as an architect?

A. Technically, as an engineer.

877 Q. Your report is the report of an engineer, isn't it?

A. Not on your life.

Q. What was it?

A. A business report. I took that engineering report into my hands and reported to them on its effect, the end result of its effect in guiding the business action they should take.

Q. You knew their business action was to be taken in reference to the possibility of liability on account of defects in the building?

A. Yes.

Q. You knew they asked you because you were an architect?

A. I presume that is the reason.

Q. You know that?

A. As a member of the board of directors. No, I don't know it.

Q. Why didn't they go to a banker if they wanted business advice?

A. They would have if they knew anybody knowing anything about it.

Q. They came to you because you were an architect?

A. Yes, and I knew their problem.

Q. You considered plans and measurements?

A. I did, all the conditions, exactly, to make up my business judgment as to what they should do.

Q. Was there any architectural or engineering chance taken in your statement: "The building is reasonably safe for temporary occupancy"?

A. There was, but not in the engineering figures.

Q. I asked about the conclusion.

878 A. Whatever element of chance there is in the use of the building with that defective condition pointed out by the engineer's figuring.

Q. The building was not unsafe for temporary occupancy, was it?

A. From an engineering point of view, it was very unsafe, and I have said so.

Q. Then this report is not any good from an engineering standpoint?

A. You think so, but I think it is perfect. Ten years' proof has shown it is good.

Q. Then it is true the building was reasonably safe for temporary occupancy in 1917?

A. Yes, with all those engineering defects I pointed out as a piece of business advice that it was reasonably safe for temporary occupancy.

Q. Did you mean to advise them only from a business standpoint?

A. That is all they asked me.

Q. The report has no value from an engineering standpoint?

A. 100 per cent value.

Q. How much did the engineering enter into it?

A. Up to the point I could make up my mind the extent of the danger, which I made up and made that report.

Q. Then with the engineering knowledge that the building was unsafe, you gave a business report that it was safe?

A. For temporary occupancy, without heavy loads or overloading, exactly.

One of the questions I have been trying to find out is what made the settlement of the building diminish. Hardening of the clay under pressure has operated to a certain extent. This may be the greatest factor, I can't say.

879 We know, after that report was written in 1915, and I had arrived at the conclusions that the settlement had entirely ceased, we know that six inches of settlement has occurred. It had stopped so that I could not observe it in 1915, but it developed renewed activity and settled six inches in ten years. It is probably due to the hardening of the clay that the settlement during the last few years has diminished. What else has caused the settlement to diminish nobody knows. I don't know that, or anyone else. It may be you have got a great deal of foundation area that is not operating, that is, the laggard foundations, the ones that have kept behind the others, because they probably did not have the same proportion of load. The lateral pressure may be carried across from the pressure of these settling foundations so that those foundations are assisting to support the building. I cannot imagine why this settlement should diminish and then speed

up again. I have not yet been able to explain why in 1915 the foundation should have apparently ceased settling, and then established this difference between 22 inches and 28 inches in the ten year interval. The table is in evidence. I cannot imagine what it was that caused this variation unless it was some drainage or some excavation problems that were operating.

There is not any peculiar feature of a pyramidal shape which makes it impossible to shore, but the compelling and important thing about it is that these particular types of foundations described as pyramidal foundations have to
880 be removed in order to put in the caissons. I can't tell how much, but probably you will end by moving it all. It depends fundamentally upon the kind of foundation Mr. Thielbar has based his experience on; that was a raft, like a plank, made out of steel and concrete; it could be pierced in the middle with a hole, through which this operation could be carried on, leaving the rest of the foundation in place and using it as a part of the supporting material on which the shoring was to be supported. It can't be done here. It never has been done. Mr. Thielbar hasn't and I have not seen it done. One of my reasons for saying that it cannot be done is that I have not seen it done. That is not the only reason. I have tried to figure out a way of doing it. I have talked to the shorers about it. That isn't the way to do it. If this thing can be done at all, my best information is that we will have to proceed along another problem. Nothing Mr. Thielbar said gave me any light. He not only doesn't know of it having been done, but he hasn't made figures on it. How can he express an opinion on a matter like this when he has never made a figure on it. I disagree with Mr. Thielbar, not because it has not been done, but because he has not tried to figure out a way he himself would solve the problem. He said he had not made a figure, but he had to have figures in order to tell which caisson to work on first, which is a minor matter. But the important matter he did not consider it necessary to make a figure on. I heard Mr. Thielbar say he had shored up columns where in his opinion the load was considerably greater than at the Auditorium. It did not in-
terest me. I heard him say that and a lot of other things
881 I didn't agree with. I did not agree with his balcony conclusion. The shoring is not the principal part of a caisson job. The principal part is supporting the bottom of the cribbing.

In trying to figure out how so large a settlement occurred since 1915, I worked on the assumption of a large settlement over this period. The 6 inches is not important, it is the large settlement. I would regard two inches as material, but not as material as the six. If as a matter of fact, the tables showed that the settlement in the last nine years was from 1 to very slightly over 2 inches, I would think somebody made a mistake on those figures somewhere along the line, because my report shows 22 inches, and it was carefully prepared, and it is on the same information that table was based on. I would be inclined to say the table was wrong, because my information came first.

882 The foregoing condensed statement of the evidence in this cause having been duly filed, and due notice having been given to all parties in accordance with the law and the rules of this Court, I hereby approve the same and certify that it is a true statement of the evidence in this cause, except Plaintiff's Exhibits 33, 34, 37, 39, 43, 45 and 47 to 75, both inclusive, Defendants' Exhibits 1 and 6 to 13 both inclusive, and Chapin Exhibit 1, all of which are to be certified by the Clerk and deemed a part of the evidence and record in this cause.

Dated this 23rd day of February, A. D. 1926.

JAMES H. WILKERSON,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

888 And on to-wit: the 23rd day of February A. D. 1926 Filed 1926. there was filed in the Clerk's Office of said Court a certain Notice in words and figures following, to-wit:

889 • • • • • •

NOTICE.

TO: Messrs: Hamlin, Topliff & Cooper,
Follansbee, Shorey & Schupp
King, Brower & Hurlbut
McCulloch & McCulloch
Elting & Judson
George W. Gordon
Butz, von Ammon & Marx
Sonnenschein, Berkson, Lautmann & Levinson
Hay & Brown,
Solicitors for certain parties
and
Louis M. Greeley, Esq.
Roswell B. Mason, Esq.
Henry Russell Platt, Esq.
Guardians ad Litem

You Are Hereby Notified that a condensed statement of the evidence in this cause has been lodged in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, and that on Saturday, February 20, 1926, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before his Honor, Judge Wilkerson, in his courtroom in the Federal Building in the City of Chicago, we shall move that said statement be approved and an order entered directing that certain exhibits be certified by the Clerk of said court to the United States Court of Appeals for the Seventh Circuit and deemed a part of the evidence and record in this cause.

Take Further Notice that if on the date above named his Honor, Judge Wilkerson, should not be sitting, we will then appear and present said motion on Tuesday, February 23, 1926, at the hour and place aforesaid.

FISHER, BOYDEN, KALES & BELL,
Solicitors for Plaintiff.

Received a copy of the foregoing notice this 10th day of February, 1926.

HAMLIN TOPLIFF & COOPER
LOUIS M. GREELEY
SONNENSCHEIN BERKSON LAUTMAN & LEVINSON
BUTZ VON AMMON & MARX
KING BROWER & HURLBUT
ROSWELL B. MASON
GEORGE W. GORDON
MCCULLOCH & MCCULLOCH
MAYER, MEYER AUSTRIAN & PLATT
HAY & BROWN
FOLLANSBEE SHOREY & SCHUPP
ELTING & JUDSON

(Endorsed) Filed February 23, 1926, Charles M. Bates, Clerk.

23 Feb. 1926. 890 And on to-wit: the 23rd day of February A. D. 1926, the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

891 • • • • • • •

Tuesday, February 23, 1926.

Present: Hon. James H. Wilkerson, Judge of said court.

ORDER.

It appearing to the Court that certain Exhibits hereinafter enumerated were offered in evidence in this cause and that it is impracticable to incorporate them in the Condensed Statement of Evidence, on motion of plaintiff it is

Ordered that plaintiff's Exhibits 33, 34, 37, 39, 43, 45 and 47 to 75 both inclusive, defendants' Exhibits 1 and 6 to 13 both inclusive, and Chapin Exhibit 1, be certified by the Clerk of this Court to the United States Circuit Court of Appeals for the 7th Circuit and deemed a part of the evidence and record in this cause.

Enter:

JAMES H. WILKERSON,
Judge of said District Court.

883 And on to wit: the 9th day of February A. D. 1926 there was filed in the Clerk's Office of said court a certain Notice in words and figures following, to wit: Filed F 1926

884 • • • • • •

NOTICE.

TO: Messrs. Hamlin, Topliff & Cooper,
Follansbee, Shorey & Schupp
King, Brower & Hurlbut
McCulloch & McCulloch
Elting & Judson
George W. Gordon
Butz, von Ammon & Marx
Sonnenschein, Berkson, Lautmann & Levinson
Hay & Brown,
Solicitors for certain parties
and
Louis M. Greeley, Esq.
Roswell B. Mason, Esq.
Henry Russel Platt, Esq.
Guardians ad Litem

Please Take Notice that on Tuesday, February 9th, 1926, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before His Honor, Judge Wilkerson, in his court room in the Federal Building, in the City of Chicago, we shall file in the above entitled cause a petition for appeal and assignment of errors, and ask that an order be entered allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, ordering that citation issue against the several defendants herein, and approving an appeal bond then and there to be tendered.

FISHER, BOYDEN, KALES & BELL,
Solicitors for Plaintiff.

Received a copy of the foregoing notice this 8th day of February, 1926.

HAY & BROWN,
McCULLOCH & McCULLOCH,
MAYER, MEYER, AUSTRIAN & PLATT,
FOLLANSBEE, SHOREY & SCHUPP,
HAMLIN, TOPLIFF & COOPER,
LOUIS M. GREELEY,
SONNENSCHEIN, BERKSON, LAUTMANN & LEVINSON,
BIETZ, VON AMMON & MARX,
KING, BROWER & HURLBUT,
ROSWELL B. MASON,
GEORGE W. GORDON,
ELTING & JUDSON.

Dec. 7. 281 And on to wit: the 7th day of December A. D. 1925 the following Decision was entered of record in said Court in words and figures following, to wit:

282 • • • • • •

DECISION.

Plaintiff is the lessee under leases covering the ground upon which the Chicago Auditorium Building is erected. The leases cover five separate parcels of land and were executed in 1887. In two of the leases Wirt D. Walker was the lessor and Mark Skinner Willing, as trustee, and other defendants, as set forth in the pleadings, have succeeded to his interest. In another of the leases Walter G. Peck, Clarence I. Peck and Ferd W. Peck were the lessors and William A. Slaten, as trustee, and other defendants, as set forth in the pleadings, have succeeded to this interest. In two of the leases Studebaker Brothers Manufacturing Company was the lessor and Emily C. Chapin and other defendants, as set forth in the bill succeeded to this interest.

283 In essential respects the provisions of the leases are the same. They are for the period of 99 years. The Lessor agrees to forthwith begin and to build on the premises a substantial and solid fire-proof building of brick, stone, iron, steel and tile and such other materials as are necessary and usual in fire-proof buildings in the City of Chicago, the

same to be in all respects in accordance with the building ordinances of the City of Chicago and to carry on and prosecute the erection of the building with all reasonable dispatch and to have the same completed before August 1, 1889, the building in the character of the materials to be used in its construction, to be as follows:

"All columns shall be of iron, stone or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists and roofing beams and joists shall be of iron or steel; all constructional floors shall be arches of hollow tile or like materials; all partitions shall be of brick or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part."

In one of the Walker leases it is provided that the building to be built on the premises shall cost not less than $475,000; in the other it is provided that the building shall cost not less than $275,000. In the Peck lease it is provided that the building on the premises shall cost not less than $400,000. In the Studebaker leases it is provided that the building to be erected on each parcel shall cost not less than $50,000. The leases provide for fixed rentals until August 1, 1906,
284 after which date, the rent is to be six per cent upon the the value of the premises, exclusive of improvements, such valuations to be made on August 1, 1906, and every ten years thereafter in the manner provided in the leases.

The leases contain the usual covenants for payment of water rates, taxes and assessments, against assignment without consent of the lessor, for the payment of rent and for the termination of the lease in case of default of the lessee in complying with the covenants of the lease.

Each of the leases contains the following provision:

"And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper cost and charges, keep the building situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease."

The leases contain provisions for the insurance of the

premises and with reference to the collection and use of the insurance in case of loss. It is provided:

"If said buildings, or any part thereof, shall at any time or times during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in writing and have the same rebuilt and ready for occupancy within two years from such loss or destruction. And that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for
285 or in respect of said insurance, shall be laid out by it in rebuilding or repairing said building."

The leases also provide:

"That in the event of the determination of this lease at any time before the expiration of the term of ninety-nine years hereby demised, for the breach of any of the covenants herein contained, then and in such case all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor; and no compensation therefor shall be allowed or paid to said lessee."

The leases provide for appraisal at the expiration of the term of the "actual cash value of any and all building or buildings, and any and all improvements that are then situate and standing upon said premises" and for securing to the lessee reimbursement for such value. It is provided:

"In making said appraisement of the value of said improvements, the appraisers or Court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case exceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant."

Upon the execution of the five leases, the lessee, with the knowledge and consent of the lessors, erected the Auditorium Building upon the five parcels of ground covered by the leases. The building is a single structure and is not separable into parts apportionable to the separate leaseholds. The building was completed about December 1, 1889. In 1891 the Walker and Peck leases were modified. The term in each

case was extended for an additional period of one hundred years so that the leases expire on August 1, 2085. The
286 provisions for revaluation were eliminated and a fixed rental provided for the entire term of the leases. It was provided that all the covenants, agreements, conditions and provisions of the original leases, except as modified by the agreement of 1891 should continue in full force and effect.

The facts, averred in the pleadings and established by the evidence, upon which plaintiff bases its claim for relief in equity are as follows:

The Auditorium Building was erected before the development of modern steel construction. It is only ten stories in height. Many more stories are required to produce an adequate return upon the ground value in central districts of cities like New York or Chicago. The Auditorium represents an obsolete type of construction. It has walls of brick and stone resting upon floating foundations. The foundation for a modern steel construction building of the best type should consist of caissons extending down to bed rock. The exterior walls of the Auditorium are what are commonly known as bearing walls, which are constructed of masonry throughout, whereas the exterior walls of a modern fireproof building of the highest type are known as screen walls and are supported upon the construction of the various floors, which are in turn supported by steel columns carrying the weight of the entire building. The columns used in the construction of the Auditorium are of cast iron, having lugs with which to support the beams and girders of the floor systems
286 which are bolted thereto, whereas, the columns in a modern fire-proof building of the highest type are built up of structural steel members which are riveted together and proportioned to carry the load thrown upon them. The beams and girders of the Auditorium have only bolted connections with the columns, whereas in modern fireproof construction of the highest type all joints are made with splice plates, lugs, and angles with riveted connections for rigid fastening and accurate predetermination of the strength and construction. The engineering formulas now employed in the construction of a modern fireproof building of the highest type state the limitations of the steel stresses and of the strength of materials used, but such formulas were not complied with in the construction of the Auditorum Building for the reason that they had not been determined. Owing to the lack of experience and lack of precedents, the methods of design and con-

struction actually employed in the erection of the Auditorium, while the best and most advanced known at the date of its construction, were inadequate and improper from a modern point of view.

Since the construction of the Auditorium, the value of the land upon which it is built has increased greatly. The character of the property in its neighborhood has changed completely. The west side of Michigan Avenue is in great demand for large and expensive buildings for hotels, offices and stores. Upon a six per cent basis, the rents fixed in the leases represent a valuation of $637,500. The present value of
287 the fee of the property in question (exclusive of the building) is more than three and one-half million dollars. The present value of plaintiff's leasehold interest, estimated upon a five per cent basis, is more than two million dollars. The net excess of the aggregate computed annual rental value on the basis of the above percentage and valuations over the actual rents now payable under the leases is more than one hundred thousand dollars. The rental value of the Auditorium property, unincumbered and unimproved, taken as a unit for building purposes is substantially greater than the aggregate rental value of the properties taken separately.

There has been a progressive increase of the burden of taxes payable by the lessee. In 1890 the taxes were $22,707.78; in 1922 they were $145,289.25. The operation of the building has not been profitable. Plaintiff has with difficulty been able to pay the ground rent due under the leases, the taxes, interest on bonded indebtednesses and other expenses of operation and to retire a small amount of its bonds. If the actual depreciation of the building at the present time is taken into consideration, substantially the only value left with which to liquidate the principal of the bonded indebtedness of $1,375,000, or to return to the stockholders any part of the investment represented by its capital stock, is the value of its leasehold interests, as represented by the difference between the present annual rental value of the fee unimproved and unincumbered and the ground rentals accruing from the
288 leasehold interests to the owners of the fee of the property.

In order to secure adequate returns upon the value of the leasehold interests, the present building must be torn down and a new one erected. Such returns can be realized only from a building of greatly increased height, which will provide the maximum obtainable number of floors with the maxi-

mum amount of floor space, and such a building would require a modern steel skeleton structure supported on caisson foundations, and carried to the maximum height now allowed by law. The present building is now thirty-five years old and is obsolete in its construction. Its general construction consists of heavy enclosing walls of masonry with a skeleton interior construction of cast-iron columns and steel or wrought iron trusses. There has occurred a large amount of settlement in the structure, amounting in some places to twenty-two inches; the maximum of settlement has occurred under the heavy masonry walls, while the skeleton interior construction has, by comparison, settled to a much less extent; and these local differences in settlement have created a distortion in the interior skeleton construction which has resulted in the fracturing of some of the struts and connections in the framework of the interior construction and in the cracking of masonry, plaster and other finished surfaces. By reason of the fact that most of the metal used in the interior construction is iron, further fractures are likely to occur.

Because of fundamental defects in the construction of
289 the building, it will continue to deteriorate and there is reasonable ground to believe that it will become unsafe. It is impossible for engineers to make a definite forecast as to how many years will elapse before that stake is reached. When that stage of deterioration shall have been reached it will not be possible to make the building safe and conformable to the municipal regulations except at a cost so great that the earnings from the building as reconstructed would not represent an adequate return upon the investment. By reason of the fact that the masonry bearing walls require large pier areas to support the loads of their own weight and the loads from the floor construction thrown upon them, the window areas do not afford adequate light for hotel and office purposes; the finishing is old faschioned and out of date; the elevators are inefficient and inadequate; the plumbing, drainage and water supply systems are inadequate, antiquated and unsound; the heating and wiring systems are inefficient. In short, the building has passed into the class of old buildings which are being torn down in the central district of Chicago to make place for structures of the size and kind necessary to earn a fair return upon the value of the land on which they are erected. The highest and best use of the property covered by the leases in suit, at the present time and for many years to come is one involving the con-

struction of a new building of greatly increased height and capacity. Any building adequate to these requirements would necessarily be a modern steel-skeleton structure carried
290 to the maximum height now permitted by law and supported on caisson foundations. The cost of such a building would be between ten and fifteen million dollars.

Plaintiff desires and proposes to remove from the Auditorium property the present building and to erect in its place an adequate, modern steel construction building at a cost of not less than ten million dollars, adapted for a hotel, auditorium and safety deposit vaults. Plaintiff has under consideration plans for such a building; and has assurances from financial institutions, that if its right under its leases to remove the old building and erect the new one can be established, the necessary funds can be procured.

The purpose of this suit is to establish plaintiff's right, under the covenants and conditions of the leases above described, to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the lessors, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement.

The averment of the bill upon which the jurisdiction of a court of equity is invoked to construe the leases is as follows:

"Defendants * * * claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants and
291 conditions of said leases even though such removal be incidental to and a part of the erection of a new and better building upon the same property, and even though adequate security be offered and given to protect the lessors from any loss of value to the property which may occur while the old improvement is being wrecked and removed, and before the new improvement is completed; and such defendants claim, and said persons with whom your orator has to deal are fearful, that, under the terms, covenants and conditions of the leases, if a destruction of the present improvement occurs or is attempted, even though that destruction be incidental to and a part of the act of erecting a new and better improvement on the same property after adequate security

as aforesaid shall have been given, it will constitute waste and a ground of forfeiture of the leases. The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising the rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law. Your orator well hoped that the defendants owning or interested in the fee of said Auditorium property would consent to the replacement of the present building by a new and more valuable improvement so as aforesaid contemplated, which would be manifestly beneficial to all parties interested in said leases, but said defendants or some of them, have refused to give such consent, or to forego the claims constituting as aforesaid a cloud upon your orator's title, unless your orator would pay them large sums of money in addition to that which is payable to them by the terms of said leases."

The proof shows that plaintiff undertook to negotiate in a general way with some of the defendants concerning the removal of the old building and the erection of a new one.
292 No definite plans were submitted; no specific demand was made. There was a discussion of the terms of the leases and defendants and their attorneys asserted that the removal of the old building would be waste and would be a ground of forfeiture. No concrete act of plaintiff was proposed and no definite threat of forfeiture was made by defendants.

The answer of Mark Skinner Willing, trustee, et al., states:

"These defendants admit that they claim and assert that the present building cannot be removed without a violation of the terms, covenants and conditions of the leases, if they be valid as leases, even though such removal may be incidental to and a part of the erection of a new and better building upon the same property, and even though alleged adequate security be offered and given to protect the defendants from any loss of value to the property which may occur while

the old improvement is being wrecked and before the new improvement is completed."

In the answer of William A. Slater, et al., it is stated:

"These defendants aver that if plaintiff destroys the present improvement, whether for the purpose of erecting a new one or otherwise, such destruction will constitute waste and will give the owners of the land described in said Peck lease, according to the terms thereof, the right to reenter and repossess themselves of such land free of any and all claims or rights of plaintiff."

The specific relief to which plaintiff claims it is entitled is stated as follows:

"That this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully
293 quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises, upon giving proper security as the court may direct, all as a part of the act of erecting upon said premises a new, suitable and more valuable building and improvement and one not in any way impairing the security of the lessor in said several leases or of their assigns and successors; * * * that the court will, likewise, upon your orator giving such security as the court may direct for the protection of the defendants herein, enjoin and restrain the defendants' interest in the fee of said properties as owners or otherwise from declaring or attempting to declare any forfeiture of any leasehold interest owned or held by your orator in which said defendants or any of them are interested as aforesaid, on account of any removal or destruction of the building or improvements upon the land subject to said leases; that said defendants may also be enjoined from taking any steps to prevent your orator from tearing down or removing the present building or improvement located upon any leasehold interest now vested in your orator in which the defendants or any of them are lessors or the assigns or successors of or interested under the original lessors. * * *"

Referring to the provision in the leases which obligate the lessors to purchase the building at the end of the term, plaintiff, in its bill, makes the following offer:

"In order to remove such questions, if any, as may prop-

erly arise about the liability of the owners of the fee to purchase and pay for larger or more expensive buildings and improvements than are now upon said properties, your orator is willing and hereby offers, in case of the replacement by your orator of the present building by larger and more costly improvements, to abide by any conditions which to the court shall seem equitable with respect to such provisions, and to waive, if and so far as such waiver shall be deemed by the court necessary or proper, its right and claim under the above mentioned provisions of said leases to payment at the termination thereof for the said improvements; and your orator hereby consents that any provision to that effect
294 deemed by the court to be conformable to equity and good conscience may be incorporated in any decree entered by the court in this cause."

Plaintiff urges that it has presented a case which entitled it in equity to have its leases construed by the Court in accordance with its interpretation of their provisions and to have that construction enforced by the Court's injunction.

It is, of course, elementary, that the Court is without power to construe these leases, unless there is presented a case in which are involved rights of persons or property, which are actually controverted in the particular case before the Court. The judicial power may not be invoked upon a prophecy as to future conditions to establish a rule for construing predicated future conduct. The plaintiff must ask that the defendant be decreed to do something; and, in a court of equity, the appeal must be predicated upon some ground which requires the exercise of the equitable powers of the Court. However desirable it might be to have a decision upon the questions relating to the construction of the leases, this Court is not empowered to decide abstract propositions, or to declare, for the government of the future conduct of the parties, principles or rules of law which cannot be made effective by the decree of the Court upon the issues which are before it. (*United States* v. *Alaska Steamship Co.*, 253 U. S. 113, 116; *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 456, 475; *California* v. *San Pablo and T. R. Co.*, 149 U. S. 308, 314; *Prather* v. *Lewis*, 287 Ill. 304; *Surry Lumber*
295 *Co.* v. *Mellons*, 129 Va., 536; *Southern Ry. Co.* v. *Georgia*, 116 Ga. 276). There is no modification of the rule just stated in *Pierce* v. *Society of Sisters of Holy Name* (decided by the Supreme Court June 1, 1925, (69 L. Ed. 685). An Act of Oregon, effective September 1, 1925, required parents and

guardians to send children between eight and sixteen years of age to the public schools. The Governor and other officers were required to enforce this law. Such enforcement meant the destruction of the private schools, whose owners sought protection against it. The Court said:

"But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this Court has gone very far to protect against loss threatened by such action. * * *

Has the plaintiff made out a case for relief under the power of a court of equity to quiet titles and to remove clouds upon titles? The remedies afforded and modes of proceeding pursued in the Federal Courts, sitting as courts of equity, were not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Broadly speaking, this equitable jurisdiction is that which was exercised by the high Court of Chancery in England at the time of the adoption of the Constitution and the passage of the original Judiciary Act, unless subsequently changed by Act of Congress. (*Duffey* v. *Smith*, 237 U. S. 101, 114; *Mississippi* 296 *Mills* v. *Cohn*, 150 U. S. 202, 204; *McConihay* v. *Wright*, 121 U. S. 201, 203). While the equitable jurisdiction of the Federal Courts may not be abridged by local law, a Federal court of equity may administer an enlargement of equitable rights and enforce and protect rights given by a state statute when such rights are properly the subject of an equity suit unless to do so would contravene the distinction between law and equity. (*L. and N. R. Co.* v. *Western Union Tel. Co.* 234 U. S. 369, 376; *Lawson* v. *U. S. Mining Co.* 207 U. S. 1; *Devine* v. *Los Angeles*, 202 U. S. 313, 333; *Creely* v. *Lowe*, 155 U. S. 56, 75; *Holland* v. *Challen*, 110 U. S. 15).

Let us examine the case of the plaintiff in the light of the general usages of equity concerning bills of peace and bills quia timet, which control here in the absence of an enlargement of right by the local law.

Under the usages of equity, bills of peace are of two kinds. First, those which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common sense. A right of fishery asserted by one party and controverted by numerous reparian proprietors on the river, is an instance given by

Story where such a bill will lie. In such cases a court of equity will interfere and bring all the claimants before it in one proceeding to avoid a multiplicity of suits. A separate action at law with a single claimant would determine nothing
297 beyond the respective rights of the parties as against each other, and each a contest with each litigant might lead to interminable litigation. To put at rest the controversy and determine the extent of the rights of the claimants in a common subject the bill lies which is thus essentially one for peace. (*Sharon* v. *Tucker*, 144 U. S. 533, 542.). Second: Bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. The equity in such a case arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be embarrassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential; he must have been in the possession of the property; he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judg-
298 ments in his favor. Upon these facts appearing the Court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession to real property—are brought that proof of actual possession is necessary to maintain the suit. (*Frost* v. *Spitley*, 121 U. S. 552; *Holland* v. *Challen*, *supra*). In most of the states there has been an enlargement of right in such cases resulting from the abolishment of the fictions of the common law action of ejectment; and the necessity of repeated adjudications at law upon the right of the plaintiff no longer exists where this new form of action has been adopted. (*Holland* v. *Challen*, *Supra*).

It is clear that plaintiff's case as stated in the bill or made out at the trial does not fall within either class of bills of peace. It is not a bill of peace of the first class because the interests of the defendants do not originate in a common source. The alleged controversies arise out of the provisions of five separate and distinct contracts. But if the bill is treated as one to determine the rights of the claimants of distinct interests in a common subject originating in a common source, the jurisdiction of this Court fails. The case was brought here by removal from the State Court on the ground that the alleged controversy between plaintiff and the defendants who removed the case was a separable one. If the
299 case falls within the first class of bills of peace it has no place here and should be remanded to the State Court. The basis of such a bill is the avoidance of a multiplicity of suits, and if the case of one defendant is separated from that of the others, the right of plaintiff to appeal for equitable relief is destroyed.

Nor has the plaintiff presented a case for relief under the rules governing bills of peace of the second class. The title of plaintiff is not assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind.

A bill quia timet or to remove a cloud upon the title of real estate, differed from a bill of the peace in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future controversy by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the Court was invoked because the party feared future injury to his rights or interests. To maintain a suit of this character it was generally necessary that the plaintiff should be in the possession of the property except where the defendants were numerous and that his title should have been established at law or be founded on undisputed evidence or long continued possession. (*Holland* v. *Challen, supra; Lawson* v. *United States, supra*).

Under the general usages of equity, the fact that the interest of the plaintiff is a leasehold estate is not a bar to
300 the maintainance of a bill to remove a cloud upon title, if the suit is in other respects well founded. A lease for a term of years is a chattel real. It conveys an interest in land. While it has some of the attributes of personality it is treated in many respects as real estate (*People* v. *Shedd*, 241

Ill. 155). Bills may be maintained in this Court under the general principles of equity jurisdiction to remove clouds upon the title to real or personal property. (*Judicial Code*, Section 57; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1). But such a bill must meet the test of the usages of equity as to what constitutes a cloud upon title, unless some enlargement of equitable rights is found in the local law.

Under the usages of courts of equity adopted by the Constitution and the Judiciary Acts, clouds upon title had a well settled and defined meaning and signification.

In *Phelps* v. *Harris*, 101 U. S. 370, 374, the Court said:

"The questions, what constitutes such a cloud upon the title, and what character of title the complainant himself must have, in order to authorize a court of equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in those Courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarrass the real owner in controverting it * * * As to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law."

301 It is also the rule, under usages of courts of equity which control here, if there is no enlargement of equitable rights by the State statutes, that a bill to quiet title will not lie to dispel mere verbal or oral assertions of ownership or interest, nor may it be maintained if the same record which must be introduced to establish the title claimed, will show there is no title. (*Devine* v. *Los Angeles*, 202 U. S. 313, 332, citing *Hannewinkle* v. *Georgetown*, 15 Wall, 547; *Louisville & N. R. Co. v. W. U. Tel. Co., supra; Parker* v. *Shannon*, 121 Ill. 452, 454; *First Congregational Church* v. *Page*, 257 Ill. 472.)

In opposition to the statements of the Supreme Courts of both the United States and Illinois as to the requirements under the general usages of equity for relief under bills quia timet, plaintiff invokes *Rector, &c.* v. *Rector &c.*, 201 N. Y. 1. There the Court sustained an action to cancel and remove a

cloud upon the title to the plaintiff's premises in the nature of a covenant restricting the use of premises to church purposes. There was a state statute which authorized the maintainance of an action to compel the determination of any claim adverse to that of the plaintiff which the defendant makes or which it appears from the public records the defendant might make to an estate or interest in real property. The Court sustained the bill under both the general powers of a court of equity and the State statute. With reference to the general usages of equity the Court said:

"The power of a court of equity may be difficult to
302 define. It is coextensive with the rights of persons to relief. Pomeroy, in his Equity Jurisprudence (Vol. 1, Sec. 181) says: 'It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to those circumstances and relations.' As applied to titles to real estate, and removing obstacles therefrom it is the ordinary jurisdiction of a court of equity to perfect and complete the means by which the title, right, estate or interest of parties may be proved or secured, or to remove obstacles which hinder its enjoyment (*Sharon* v. *Tucker*, 144 U. S. 533).

The opinion in which it was stated that the action could be maintained under general equitable rules as one to remove a cloud upon title, as well as under the State statute, was concurred in by three justices only. In the dissenting opinion, likewise concurred in by three judges, it was said:

"An appeal to the equity powers of the Court, it is necessary that the case shall fall under some recognized head of equity jurisdiction which would comprehend such an action as this. It is asserted, however, that the power of a court of equity is coextensive with the rights of persons to relief, and that the provisions of our code are broad enough for the case. The first assertion is true only, in a case of equitable cognizance. When a person brings an equitable action, he must maintain it upon some equitable ground. However elastic and discretionary the exercise of the power to grant equitable relief, I do not believe that it can be properly invoked by a party to cancel a covenant in his grant. I am not aware of

any precedent and we are cited to none. Though in matters of apparent equity, as fraud, or breach of trust, precedents are not necessary, it is dangerous to extend the practice of the Court further than the practice of former times * * *

There is no charge of any fraudulent practices or of mis-
303 take * * * The plaintiff is seeking, affirmatively, to annul as a cloud upon its title, an agreement which entered into the consideration for the conveyance upon the ground that it was invalid, because unenforceable. If the invalidity of the covenant can be established by extrinsic evidence, then the plaintiff can defeat any action brought to enforce it. Can it be true that it is a cloud upon the title? There is no adverse claim to the property, and whether the restrictive covenant be valid or invalid how can it create a cloud upon title? If invalid, the defect would, necessarily, appear in any proceeding by the defendant to enforce it. I do not think that the fact that a defense exists to its enforcement is sufficient to warrant a resort to an equitable action."

The case was decided by the vote of the Chief Justice, who merely concurred in the result, without indicating whether he regarded the general equity powers of the Court or the State statute as the proper basis for the action.

The principles stated in *Sharon* v. *Tucker, supra,* do not warrant any such extension of the powers of a court of equity with reference to bills to remove clouds upon title as is set forth in the opinion of the Court in *Rector, &c.* v. *Rector, &c.* The opinion in the former case was by Mr. Justice Field, who wrote the opinion in *Holland* v. *Challen, supra.* In *Holland* v. *Challen* the requirements of bills of the peace and bills to remove clouds upon title are stated and the limitations are the case which have been set forth above. In *Sharon* v. *Tucker,* it is pointed out that the bill in that case could not be maintained either as a bill of peace or a bill to remove a cloud. The ground of equitable jurisdiction was the protection of a title not evidenced by any record but resting in the recollection of witnesses and the warrant for its exercise was found in the ordinary jurisdiction of equity to perfect and com-
304 plete the means by which the right, interest or estate of holders of real property—that is, their title—may be proved and secured or to remove obstacles to its enjoyment. The plaintiffs claimed title by adverse possession. There was no record of their title and its establishment was dependent upon the recollection of witnesses. The object of the suit was to provide record evidence of the title. The court said:

"The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record."

It was with reference to such a case that the Supreme Court of the United States made the general observation that the flexibility of decrees of a court of equity will enable it to meet every emergency. But, of course, the statement was made with reference to cases of equitable cognizance. An equitable action, however, broad and elastic the relief may be, must be maintained upon some equitable ground. And in *Sharon* v. *Tucker*, the equitable ground was stated to be one entirely different from that on which bills to remove clouds on title are maintained. The bill in *Sharon* v. *Tucker* was sustained on the same principle as that on which the existence of lost deeds is established in equity. There is nothing in the case which even remotely warrants a modification of the requirements of bills to remove clouds on title as they have been
305 laid down in *Holland v. Challen, supra, Devine* v. *Los Angeles, Supra*, and other decisions of the Supreme Court. There is nothing in the case which sustains the right to maintain in equity a bill to remove a cloud on title, where the alleged cloud arises from a covenant in the grant by which the plaintiff obtains his interest or estate in the property. An examination of the cases demonstrates that the usages of equity concerning bills to quiet title, as recognized in the Federal Courts, are correctly stated in the dissenting opinion of Justice Gray in *Rector, &c.* v. *Rector, &c., supra*, in which three judges only concurred.

The plaintiff, in my opinion, has failed to make out a case under the general usages of equity as to bills to remove clouds on title. The alleged cloud arises out of verbal or oral claims of the lessors concerning the construction of the lease under which plaintiff derives its right to the possession of the premises. If the lease is clearly to be construed as plaintiff claims it should be, then the invalidity of the contentions of the defendants appears from the document which plaintiff introduces to establish its title. If the construction of the lease is doubtful, then the claim of defendants is more than a cloud and they are entitled to have it tried by an action at law. (*Phelps* v. *Harris*, 101 U. S. 370, 375). Plaintiff's case as a suit to quiet title under the general usages of equity reduces

itself to this: Whenever a controversy arises between landlord and tenant as to the construction of the provisions
306 of the lease touching the use of the demised premises, the tenant may resort to a court of equity; and, in the guise of a suit to remove a cloud on title, obtain a construction of the lease which will be binding upon the landlord when he attempts to enforce by legal remedies the provisions of the contract. Such an action is contrary to the usages of equity and contravenes the fundamental distinction between law and equity.

Having viewed plaintiff's case in the light of the general usages of equity controlling the Federal Courts and as if there were no local statute or local law with reference to what constitutes a cloud on title, let us inquire whether or not there is any enlargement of equitable right under the local law which will be here administered. While it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights themselves may be administered by the Federal Courts as well as by the courts of the State. It is proper to look to the legislation of the State in which the Court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such, the Courts of the United States sitting in equity have the power to remove. There are many State statutes of this kind and it has been said that "an enlargement of equitable rights is effected although presented in the form of remedial
307 proceeding" (*Holland* v. *Challen, supra*). Indeed much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of the parties. (Broderick's Will Case, 21 Wall. 520). The decisions show that the enforcement of statutes of this type in the Federal Courts are subject to three restrictions: 1, The case must be within the general class over which those courts are given jurisdictions; 2, A suit in equity does not lie where there is a plain, adequate and complete remedy at law; 3, In those Courts there can be no commingling of legal and equitable remedies or substitution of the latter whereby the constitutional right of trial by jury in actions at law is defeated. (*Louisville & N. R. Co.* v. *Western Union Tel. Co.*, 234 U. S. 369, 376, and cases there cited.)

It is provided by the Chancery Act of Illinois (1 J. & A. Stat. 785) that the Court may hear and determine bills to

quiet title, and to remove clouds from the title to real estate, and bills to establish and confirm title to real estate or incumbrance thereon whether the lands in controversy are improved or occupied or unimproved or unoccupied. The clause "and bills to establish and confirm titles to real estate or incumbrances thereon" was introduced by an amendment of June 5, 1911, (Session Laws, p. 253). The power of courts of equity to remove clouds upon title to real estate under the Illinois Statute is substantially no broader under the Illinois Statute, prior to the amendment of 1911, than it is under the general usages of courts of equity. There are some pro-
308 visions as to possession and occupation which are not material here. A bill will not lie to remove a mere verbal assertion of ownership in property as a cloud upon title. A cloud upon title is a claim, apparently valid, which may be removed by extrinsic evidence, and equity will not take jurisdiction to remove a cloud on a title where there is no defect in the title except what is apparent on the face of the instrument under which the title is derived. (*Greenough* v. *Greenough*, 234 Ill. 416; *First Congregational Church* v. *Page*, 257 Ill. 472; *Parker* v. *Channon*, 121 Ill. 452). "It would be a rather anomalous situation", says the Court in *First Congregational Church* v. *Page*, *supra*, "to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims title".

As to the amendment of 1911, the power conferred upon courts of equity is the power to establish and confirm titles to real estate. While a lease for a long term of years is treated under certain statutes and for certain purposes as real estate, it is essentially a chattel real. A lease, although for a long term with payments of annual rent is not a sale, which is a grant of absolute ownership. (*Chicago* v. *Tribune Co.*, 248 Ill. 242; *People* v. *Shedd*, *supra*). It would be an unwarranted application of this provisions to extend it to controversies between a landlord and tenant relative to the construction of the lease. When it is real in its relation to the statute of which it is a part, it is apparent that it cannot have such
309 an application. Moreover, before this provision will be administered in the Federal Courts, the case which is based upon it must be one over which those courts have jurisdiction. The Court will not entertain a case merely for the purpose of establishing a rule for controlling predicted future conduct. Resort to a court of equity must be predicted upon some equitable ground. A bill to establish and confirm title.

if it is to be maintained in this Court, must be grounded upon some principle upon which courts of equity grant relief, as was the case in *Charon* v. *Tucker, supra.* Property owners may not rush to a court of equity merely to have it do the work which is ordinarily performed by those who give opinions as to title or who guarantee those titles. The State statutes, as they must be administered here, do not enlarge the equitable rights of plaintiff so as to permit it to maintain this action which is not cognizable, as a bill to remove a cloud upon title, under the general usages of courts of equity.

While the bill has been presented as one to remove a cloud from title, it is proper to inquire whether, upon the facts alleged and proved, there is any other ground upon which plaintiff's appeal to a court of equity may be sustained. The plaintiff should not be limited by phraseology in pleading or by the specific form in which the claim for relief is presented.

The bill may not be sustained as one to enjoin a threatened breach of contract. Certainly an assertion by a lessor that he places a construction upon a lease different from the
310 one which the lessee thinks it should receive is not a breach of the implied covenant of quiet enjoyment. A suit to enjoin a breach of a negative covenant in a contract is governed in the main by the same principles as is a suit for specific performance of an affirmative covenant. If the right is doubtful, relief by injunction is improper, and plaintiff's suit here is based upon the alleged doubts arising from the provisions of the lease. No act of defendants has been suggested which amounts even remotely to a threatened breach of the covenant of quiet enjoyment.

The bill may not be sustained as one to enjoin a forfeiture. No forfeiture has been declared. No cause of forfeiture is stated in the bill. No notice of breach of covenant has been given. The six months' period given plaintiff to cure its default has not even begun.

It is urged that this bill must be sustained upon the broad principles of equity jurisdiction, that plaintiff has no adequate remedy at law and that the power of a court of equity is coextensive with the rights of persons to relief. In other words, plaintiff invokes the principle that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in equity.

It is true that the absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity. It is the distinguishing feature of equity

jurisdiction that it will apply settled rules to unusual
311 conditions and mold its decrees so as to do equity between the parties. But while this is true, yet the facts of the case must come within some head of equity jurisprudence. When a person brings an equitable action he must maintain it upon some equitable ground. The great advantage possessed by a court of equity is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Before the rule as to inadequacy of remedy at law is applied, some wrong must be shown for which the plaintiff is entitled to redress. In other words, there must be a cause of action whether resort is had to one forum or the other. A court of equity, by avowing that there is a right but no remedy known to the law, cannot create a right in violation of the principles of both law and equity. Before there is a remedy either at law or in equity there must be a wrong cognizable in courts of justice under the established principles of law or equity. And what wrong have defendants done by merely asserting that they place upon the contracts in question a construction different than that for which plaintiff contends?

The offer to give bond for the construction of the new building and the offer to reform the provisions of the leases with reference to purchase of the building at the expiration of the terms, do not aid the plaintiff. Rather they emphasize the fundamental infirmity in its appeal for equitable relief.

If plaintiff is right in its construction of the leases, it is
312 entitled to tear down the old building and to put up a new one without giving bond and without submitting to a modification of the leases. If plaintiff's contention is wrong, a court of equity cannot relieve against the obligations of the contracts in the absence of some element of fraud, accident or mistake. Equity does not have power to make contracts for the parties which they have not made for themselves.

The bill will be dismissed without prejudice to the rights of the plaintiff under the leases here involved when those rights are asserted in any appropriate proceeding.

JAMES H. WILKERSON,
United States District Judge.

December 7, 1925.

313 And on to-wit: the 30th day of January A. D. 1926, Entered 30, 192
the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

314 * * * * * *

Saturday, January 30, 1926.

Present: Honorable James H. Wilkerson, Judge of Said Court.

DECREE.

This Cause again came on to be heard at this term, and the evidence heretofore received upon the issues joined and the arguments of counsel heretofore heard were considered by the court: and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1: That the bill of complaint, as amended and supplemented, be and it hereby is dismissed for want of equity jurisdiction in the court to grant any relief upon the pleadings and the evidence, but without prejudice to whatever rights the plaintiff may have under the leases here involved, when asserted in any appropriate proceeding or otherwise.

2: That each and all of the defendants do have and recover of the plaintiff their proper costs herein, and that any such costs, if any, as are not fixed by statute, be hereafter fixed and taxed by order of court upon application of the parties interested, and for the latter purpose jurisdiction of the court over this cause is retained until further order;

and jurisdiction of this cause is also retained by the
315 court to ascertain the reasonable amounts, if any, allowable to the guardians ad litem, heretofore appointed herein, for their services herein, and to make such determination as may be proper, if any, as to the liability therefor and the recovery thereof.

Enter:

JAMES H. WILKERSON
Judge.

Jan 30, 1926.

Feb. 9, 1926. 316 And on to-wit: the 9th day of February A. D. 1926 there was filed in the Clerk's Office of said Court a certain Petition for Appeal in words and figures following, to-wit:

317 * * * * * *

PETITION FOR APPEAL.

Chicago Auditorium Association, plaintiff in the above entitled cause, conceiving itself to be aggrieved by the final decree entered in the above entitled cause as of the thirtieth day of January A. D. 1926, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, upon the grounds and for the reasons specified in its assignment of errors filed herewith; and it prays that its appeal be allowed, that citation issue against the defendants herein, and that a duly authenticated transcript of the record and proceedings herein may be transmitted forthwith to said Circuit Court of Appeals.

FISHER, BOYDEN, KALES & BELL
Solicitors for said Plaintiff

WALTER L. FISHER
WILLIAM W. CASE
of Counsel

Endorsed Filed February 9, 1926, Charles M. Bates, Clerk.

Feb. 9, 1926. 318 And on to-wit: the 9th day of February A. D. 1926 there was filed in the Clerk's Office of said Court certain Assignment of Errors in words and figures following, to-wit:

319 * * * * * *

And now comes Chicago Auditorium Association, Plaintiff and Appellant in the above entitled cause, and says that in the decree in said cause there is manifest error, in this, to-wit:

First: The District Court erred in dismissing the bill of complaint in said cause as amended and supplemented, for want of equity jurisdiction.

Second: Said District Court erred in refusing to enter

a decree in favor of the plaintiff in said cause in accordance with the prayer of its bill of complaint as amended and supplemented.

Wherefore Plaintiff prays that said decree may be reversed, with directions to enter a decree in favor of plaintiff, or with such other directions as may be deemed proper in the premises, and for all other appropriate relief.

FISHER, BOYDEN, KALES & BELL
Solicitors for Plaintiff

WALTER L. FISHER
WILLIAM W. CASE
Of Counsel

Endorsed Filed February 9, 1926, Charles M. Bates, Clerk.

320 And on to-wit: the 9th day of February A. D. 1926, Filed 192
there was filed in the Clerk's Office of said Court a certain Appeal Bond in words and figures following, to-wit:

321 * * * * * *

APPEAL BOND.

Know All Men By These Presents That Chicago Auditorium Association, a corporation of the State of Illinois, as principal, and The Fidelity and Casualty Company of New York, as surety, are held and firmly bound unto Mark Skinner Willing and the other appellees in the above entitled cause, in the sum of Five Hundred Dollars ($500), for the payment of which well and truly to be made said Chicago Auditorium Association and The Fidelity and Casualty Company of New York jointly and severally bind themselves, and their successors and assigns, firmly by these presents, this 6th day of February, A. D. 1926. The condition of this obligation is such, that

Whereas, the above named Chicago Auditorium Association has prosecuted an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the order and decree entered in the above entitled cause as of the 30th day of January, 1926.

322 Now, Therefore, if the above named Chicago Auditorium Association shall prosecute its said appeal to effect and answer all damages and costs if it fail to make

said appeal good, then this obligation shall be void, but otherwise shall be and remain in full force and virtue.

CHICAGO AUDITORIUM ASSOCIATION
By R. FLOYD CHILDS
President

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By WALTER L. WILDER
(Seal) *Attorney*

Approved February 9th, 1926.

JAMES H. WILKERSON
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Endorsed Filed February 9, 1926, Charles M. Bates, Clerk.

323 Duplicate: Revenue Tax Paid on Original

The Fidelity and Casualty Company of New York

The Pioneer Bonding Company of the United States

Bonding Department: Hale Anderson, Assistant Secretary, in charge

92 Liberty Street, New York City

Know All Men By These Presents:

That The Fidelity and Casualty Company of New York has made, constituted, and appointed, and by these presents does make, constitute, and appoint Walter L. Wilder, of Chicago, Illinois, its true and lawful attorney for it and in its name, place, and stead to execute on behalf of the said Company, as surety, bonds, undertakings, and contracts of suretyship to be given to all obligees; provided that the liability of the Company as surety on any bond or undertaking or contract of suretyship executed under this authority shall not exceed the sum of five hundred thousand dollars.

In Witness Whereof The Fidelity and Casualty Company of New York has caused its official seal to be hereunto affixed, and these presents to be signed by one of its assistant secre-

taries and attested by one of its assistant secretaries this 14th day of June, 1923.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

By HALE ANDERSON
Assistant Secretary

Seal

Attest:
ALBERT BRUNS
Assistant Secretary

Seal

324 State of Illinois } ss.
County of Cook }

I, A. V. Lambert, a Notary Public of Cook County, in the State of Illinois, do hereby certify that Walter L. Wilder, Attorney of The Fidelity and Casualty Company of New York, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered said instrument, for and on behalf of The Fidelity and Casualty Company of New York for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Chicago, in said County, this 6 day of February A. D. 1924.

A. V. LAMBERT
Notary Public

Seal

Feb. 9. 325 And on to-wit: the 9th day of February 1926, the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

326 • • • • • • •

Tuesday, February 9, 1926.

Present: Hon. James H. Wilkerson, Judge of Said Court:

ORDER ALLOWING APPEAL.

It appearing to the Court that the plaintiff has duly filed herein its petition for an appeal and its assignment of errors, it is

Ordered that an appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, be and it hereby is allowed to the plaintiff from the final decree entered in this cause as of the thirtieth day of January, A. D. 1926, that citation issue against the defendants herein, and that said plaintiff file its appeal bond in the penal sum of Five Hundred Dollars ($500), with surety to be approved by the court.

And thereupon came the said plaintiff and tendered its appeal bond in the penal sum aforesaid with The Fidelity and Casualty Company of New York as surety; and said bond is hereby approved and ordered to be filed; and the Clerk of this Court is ordered to transmit to said Circuit Court of Appeals within thirty (30) days from this date a duly authenticated transcript of the record and proceedings in this cause.

Enter.

JAMES H. WILKERSON
Judge of said District Court

885 And on to-wit: on the 19th day of February A. D. 1926, there was filed in the Clerk's Office of said Court a certain Notice in words and figures following to-wit: Filed 1926.

886 * * * * * *

NOTICE.

To: Fisher, Boyden, Kales & Bell, Solicitors for Complainant,
King, Brower & Hurlbut,
Follansbee, Shorey & Schupp,
McCulloch & McCulloch,
George W. Gordon,
Elting & Judson,
Butz, Von Ammon & Marx,
Hay & Brown,
Sonnenschein, Berkson, Lautmann & Levinson,
Solicitors for certain defendants, and
Henry Russell Platt,
Roswell B. Mason, and
Louis M. Greeley,
Guardian ad Litems:

You are hereby notified that the undersigned will, at the hour of 11:00 o'clock in the forenoon of Friday, the 19th day of February, A. D. 1926, file in the office of the clerk of the above entitled court a praecipe for portions of the record in addition to those portions of the record specified in the praecipe for transcript heretofore filed in this cause by counsel for the plantiff, and shall ask that such additional portions of the record be incorporated in the transcript to be pre-
887 pared by the clerk of said court for the appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

A copy of said praecipe for additional portions of the record and of this notice is herewith handed to you.

SAMUEL TOPLIFF
HOMER H. COOPER
Attorneys for The Northern Trust Company and Mark S. Willing as Trustees, etc., and Mark S. Willing individually.

Received a copy of this notice and of the praecipe for additional portions of the record therein mentioned this 18th day of February, A. D. 1926.

FISHER BOYDEN KALES & BELL
ELTING & JUDSON
FOLLANSBEE SHOREY & SCHUPP
HAY & BROWN
HENRY RUSSELL PLATT
MCCULLOCH & MCCULLOCH
GEORGE W. GORDON
ROSWELL B. MASON
KING BROWN & HURLBUT
BUTZ VON AMMON & MARX

Endorsed Filed February 19, 1926, Charles M. Bates, Clerk.

898 And on to-wit: the 5th day of March A. D. 1926, there was filed in the Clerk's office in said Court a certain Stipulation in words and figures following, to-wit:

899 . . . . . .

STIPULATION.

Filed Ma 1926.

It Is Stipulated and Agreed by the parties to this cause, by their respective solicitors, that an order may be entered ordering that the Clerk of this Court certify to the Circuit Court of Appeals as a part of the record in this cause upon the appeal herein the roiginal condensed statement of evidence heretofore approved and filed with the Clerk of this Court; and that the copy now submitted to the Court of certain amendments to the bill of complaint filed herein December 28, 1923, as found and recited in the order of that date in this cause, but not entered on the Clerk's register, be now filed nunc pro tunc as of December 28, 1923, and stand with the same force and effect as the original thereof.

FISHER BOYDEN KALES & BELL
Solicitors for Plaintiff.

HAY & BROWN
ELTING & JUDSON
MCCULLOCH & MCCULLOCH
GEORGE W. GORDON
BUTZ, VON AMMON & MARX
SONNENSCHEIN BERKSON LAUTMANN & LEVINSON
KING BROWER & HURLBUT
HAMLIN TOPLIFF & COOPER
FOLLANSBEE SHOREY & SCHUPP
Solicitors for Certain Defendants.

HENRY RUSSELL PLATT
ROSWELL B. MASON
LOUIS M. GREELEY
Guardians ad Litew.

Endorsed Filed March 5, 1926, Charles M. Bates, Clerk.

900 And on to-wit: the 5th day of March A. D. 1926, the following proceedings were had and entered of record in said Court in words and figures following, to-wit:

901 • • • • • • •

Mar. 5. Friday, March 5, 1926.

Present: Honorable James H. Wilkerson, Judge of Said Court:

ORDER.

On motion of plaintiff and by agreement and stipulation of the parties to this cause,

It Is Ordered that the Clerk of this Court certify to the Circuit Court of Appeals as a part of the record in this cause upon the appeal herein the original condensed statement of evidence heretofore approved and filed with the Clerk of this Court; and that the copy now submitted to the Court of certain amendments to the bill of complaint filed herein December 28, 1923, as found and recited in the order of that date in this cause, but not entered on the Clerk's register, be now filed nunc pro tunc as of December 28, 1923, and stand with the same force and effect as the original thereof.

Enter:

JAMES H. WILKERSON
Judge of said District Court.

892 • • • • • • •

PRAECIPE FOR TRANSCRIPT.

Feb. 11. To the Clerk of the District Court of the United States, For the Northern District of Illinois, Eastern Division.

You will please prepare and certify a transcript of the record in the above entitled cause for an appeal to the United States Circuit Court of Appeals for the seventh circuit, and include therein the following:

1. Transcript of the proceedings in the Circuit Court of Cook County, Illinois as filed in the District Court of the United States, which among other proceedings includes the following that are to be incorporated in said transcript for appeal to said United States Circuit Court of Appeals, to-wit:

(a) Placita

(b) Bill of Complaint

(c) Demurrer of Illinois Trust & Savings Bank, filed March 20, 1923

(d) Demurrer of Emily C. Chapin, et al., filed March 24, 1923

(e) Demurrer of Ambrose Cramer, et al., filed April 4, 1923

893 (f) Petition of Charles L. Harrison for removal of cause, filed May 19, 1923

(g) Order for removing cause to United States District Court entered May 19, 1923

(h) Certificate of Clerk of Circuit Court of Cook County, Illinois

2. Motion to dismiss bill of complaint by William A. Slater, et al. July 3, 1923.

3. Motion and order appointing Henry Russell Platt guardian ad litem November 23, 1923.

4. Order of December 12, 1923 that demurrer of Willing et al stand as motion to dismiss.

5. Motion and order of December 12, 1923 appointing Louis M. Greeley guardian ad litem.

6. Amendments to bill of complaint, filed December 28, 1923.

7. Order of December 28, 1923 that demurrer of Illinois Trust & Savings Bank and motions to dismiss bill stand as motions to dismiss bill as amended.

8. Answer of Henry Russell Platt, guardian ad litem, filed December 31, 1923.

9. Motion of Ambrose Cramer, et al. to dismiss bill as amended, entered January 2, 1924.

10. Motion by Louis M. Greeley, guardian ad litem, to dismiss, January 2, 1924.

11. Order entered April 18, 1924 overruling motions to dismiss.

894 12. Amendment and supplement to bill of complaint, filed April 25, 1924.

13. Answer of Illinois Merchants Trust Company, April 26, 1924.

14. Two answers of bondholders, filed May 22, 1924.

15. Answer of bondholders, filed May 29, 1924.

16. Motion and order appointing Roswell B. Mason guardian ad litem, June 22, 1924.

17. Answer of Louis M. Greeley, guardian ad litem, June 23, 1924.

18. Order substituting the Northern Trust Company as defendant, June 10, 1924.
19. Answer of the Northern Trust Company, Trustee, etc. June 10, 1924.
20. Answer of William A. Slater, et al., June 14, 1924.
21. Answer of Roswell B. Mason, guardian ad litem, June 21, 1924.
22. Answer of Emily C. Chapin, et al., October 9, 1924.
23. Answer of Henry Russell Platt, guardian ad litem, December 12, 1924.
24. Motion of Louis M. Greeley, guardian ad litem, December 26, 1924, to remand cause.
25. Order of February 18, 1925 overruling motion to remand.
26. Opinion of Hon. James H. Wilkerson, Judge of said Court, filed December 7, 1925.

895 27. Final decree dismissing bill.

28. Petition for appeal.
29. Assignment of errors.
30. Appeal bond.
31. Order allowing appeal and approving appeal bond.
32. Citation and papers relative to service thereof.
33. Condensed statement of evidence approved by District Judge.
34. Order relative to certification of exhibits.
35. Notices and proof of service relative to appeal.
36. This praecipe for transcript and proof of service thereof.

EXHIBITS.

Please be advised also that we shall ask an order directing that Plaintiff's Exhibits 33, 34, 37, 39, 43, 45 and 47 to 75, both inclusive, and Defendants' Exhibits 1 and 6 to 13, both inclusive, and Chapin Exhibit 1 be certified to said Circuit Court of Appeals, and you are therefore requested to certify said Exhibts as a part of the record accordingly.

FISHER, BOYDEN KALES & BELL
Attorneys for Plaintiff

Dated this 11th day of February, A. D. 1926.

896 The undersigned attorneys for defendants in the above entitled cause hereby acknowledge service and receipt of a copy of the foregoing praecipe this 11th day of February, A. D. 1926.

McCulloch & McCulloch
Mayer, Meyer, Austrian & Platt
Follansbee Shorey & Schupp
Hay & Brown
George W. Gordon
Sonnenschein Berkson Lantmann & Levinson
Butz von Ammon & Marx
King Brower & Hurlbut
Roswell B. Mason
Louis M. Greeley
Hamlin Topliff & Cooper
Elting & Judson

Endorsed Filed February 11, 1926 Charles M. Bates, Clerk.

897 • • • • • •

PRAECIPE FOR ADDITIONAL PORTIONS OF RECORD.

To the Clerk of Said Court:

You are hereby requested to prepare and to certify under Equity Rule No. 75(a) portions of the record in the above entitled cause, in addition to those portions of the record specified in the praecipe for transcript heretofore filed herein on behalf of the plaintiff and to incorporate such additional portions of the record in the transcript, at appropriate places, chronologically, for the appeal of the plaintiff to the United States Circuit Court of Appeals for the Seventh Circuit.

You will please prepare and certify the following additional portions of the record:

(1) Under date of April 18, 1924, the Honorable James H. Wilkerson, Judge of above entitled Court, filed herein an opinion designated as "Decision" on the motions to dismiss. Said opinion or decision is desired. (See also Rules of the United States Circut Court of Appeals, Rule 140, par. 2.)

(2) Under date of February 2, 1925, order of court overruling motion of Louis M. Greeley as guardian ad litem of certain defendants to remand case to state courts; also motion of The Northern Trust Company and Mark Skinner Willing as Trustees under the will of Henry J. Willing, deceased, ot remand said cause to the courts of Illinois; also motion of Mark Skinner Willing, individually, to remand said cause to the courts of Illinois; also order of the District Court granting leave to file said motions to remand and overruling said motions.

(3) This praecipe for additional portions of record and proof of service thereof.

SAMUEL TOPLIFF
HOMER H. COOPER
Attorneys for The Northern Trust Company and Mark S. Willing as Trustees, etc. and Mark S. Willing individually.

Dated this 19th day of February, A. D. 1926.

902 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled

Chicago Auditorium Association

—*vs*—

Ambrose Cramer, Trustee, et al

as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 6th day of March, A. D. 1926.

CHARLES M BATES
Clerk.

(Seal)

903 United States of America, } ss:

The President of the United States To: Mark Skinner Willing and The Northern Trust Company, as trustees under the last will and testament of Henry J. Willing, deceased, Mark Skinner Willing, Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.; also William A. Slater, Jr., E. Halsey Malone and Charles Lewis Harrison, as trustees under the last will and testament of William A. Slater, deceased, Ellen B. Slater, William A. Slater, Jr., John Fox Slater, Eleanor Malone, Elena de Struve, Boris de Struve, and Ardian Malone; also Bayard Warren and Bayard Tuckerman, Jr., as trustees, Elizabeth Sears Warren, Bayard Warren, Jr., Lily Warren, Camilla Warren, Caroline Sears Warren, Phyllis Sears Tuckerman, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman; also Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as trustees under the last will and testament of Charles A. Chapin, deceased, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Charlotte Gardiner Robertson, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Henry Kent Chapin, Henry Kent Chapin, Jr., Charles A. Chapin, Ruby Chapin Pitner, Lowell Mead Chapin, Elizabeth Chalifoux Chapin, Coolidge Mead Chapin, and Charles Douglas Chapin; also Illinois Merchants Trust Company, as trustee under a certain trust deed from The Corporation of the Fine Arts Building dated March 5, 1903, and recorded in the office of the recorder of Cook County, Illinois, in Book 8241 of Records, at page 43, as Document No. 3382697; also First Trust and Savings Bank, George Higginson Jr., and Columbus Healy, in their own right and as representatives of the legal holders and owners of all bonds secured by said trust deed; also Illinois Merchants Trust Company, as trustee under two certain mortgage deeds of trust from Chicago Auditorium Association, one dated February 1, 1889, and recorded in the office of the recorder of Cook County, Illinois, in Book 2515 of Records, at page 61, as Document No. 1058261, and the

other dated February 1, 1892, and recorded in said recorder's office in Book 3916 of Records, at page 145, as Document No. 1693161; also Caroline P. McCready, The Northern Trust Company, as trustee under the last will and testament of Mary E. Shields, deceased, Edwin A. Seipp, and The Northern Trust Company as trustee under the last will and testament of Edward W. McCready, deceased, in their own right, and as representatives of the legal holders and owners of all bonds secured by said mortgage deed of trust recorded as document No. 1058261; also Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp, and The Northern Trust Company as trustee under the last will and testament of Adele C.
904 Stone, deceased, in their own right and sa representatives of the legal holders and owners of all bonds secured by said deed of trust recorded as document No. 1693161; also William Sherman Hay, Defendants, and Charles C. Bullock, Aida Lester and Minna Lester, Intervening Petitioners. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal which has been allowed by the District Court of The United States for the Northern District of Illinois, Eastern Division, and filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Chicago Auditorium Association is Appellant and you are Appellees to show cause, if any there be, why the decree rendered against the said Appellant as in the said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James H. Wilkerson, Judge of the District Court of the United States, this 10th day of February, in the year of our Lord one thousand nine hundred and twenty-six.

JAMES H. WILKERSON
Judge.

905 Service of this citation and receipt of a copy thereof on this 10th day of February, 1926, and hereby acknowledged.

HAMLIN TOPLIFF & COOPER
Attorneys for The Northern Trust Co. and M. S. Willing et al.
SONNENSCHEIN, BERKSON, LAUTMANN & LEVINSON
LOUIS M GREELEY
BUTZ VON AMMON & MARX
KING BROWER & HURLBUT
ROSWELL B. MASON
GEORGE W. GORDON
MCCULLOCH & MCCULLOCH
MAYER, MEYER, AUSTRIAN & PLATT
HAY & BROWN
FOLLANSBEE SHOREY & SCHUPP
ELTING & JUDSON

906 On this tenth day of February, in the year of our Lord one thousand nine hundred and twenty-six, personally appeared Frederick C. E. Lundgren before me, the subscriber, David A. Watts and makes oath that he delivered a true copy of the within citation to:

Messrs. Hamlin, Topliff & Cooper, Solicitors of record for the defendants Mark Skinner Willing and The Northern Trust Company, as trustees under the last will and testament of Henry J. Willing, deceased and for the defendant Mark Skinner Willing.

Louis M. Greeley, Esq., guardian ad litem for the defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

Messrs. Follansbee, Shorey & Schupp, successors to Adams, Follansbee, Hawley & Shorey, Solicitors of record for the defendants William A. Slater, Jr., E. Halsey Malone, and Charles Lewis Harrison, as trustees under the last will and testament of William A. Slater, deceased, for the defendants Ellen B. Slater, William A. Slater, Jr., Eleanor Malone, Elizabeth Sears Warren, Phyllis Sears Tuckerman and for the defendants Bayard Warren and Bayard Tuckerman, Jr., as trustees.

Roswell B. Mason, Esq., guardian ad litem for the defendants John Fox Slater, Elena de Struve, Boris de Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Camilla

Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman.

Messrs. King, Brower & Hurlbut, Solicitors of record for the defendants Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as trustees under the last will and testament of Charles A. Chapin, deceased, and for the defendants Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Charlotte Gardiner Robertson, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin.

907 Henry Russell Platt, Esq., guardian ad litem for the defendants Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Henry Kent Chapin, Jr., Charles A. Chapin, Elizabeth Chalifoux Chapin and Coolidge Mead Chapin.

Messrs. McCulloch & McCulloch, successors to McCulloch, McCulloch & Dunbar, Solicitors of record for the defendant Illinois Merchants Trust Company, formerly Illinois Trust & Savings Bank, as trustee under a certain trust deed from The Corporation of the Fine Arts Building, dated March 5, 1903 and recorded in the office of the recorder of Cook County, Illinois in book 8241 of records at page 43 as document No. 3382697 and as trustee under two certain mortgage deeds of trust from Chicago Auditorium Association, one dated February 1, 1889 and recorded in the office of the recorder of Cook County, Illinois, in book 2515 of records at page 61, as document No. 1058261, and the other dated February 1, 1892, and recorded in said recorder's office in book 3916 of records at page 145 as document No. 1693161.

George W. Gordon, Esq., Solicitor of record for the defendants First Trust and Savings Bank, George Higginson, Jr., and Columbus Healy in their own right and as representatives of the legal holders and owners of all bonds secured by said trust deed recorded as document No. 3382697.

Messrs. Elting & Judson, Solicitors of record for the defendants Caroline P. McCready, The Northern Trust Company as trustee under the last will and testament of Mary E. Shields, deceased, Edwin A. Seipp, and The Northern Trust Company as trustee under the last will and testament of Edward W. McCready, deceased, in their own right and as legal holders and owners of certain bonds secured by said mortgage deed of trust recorded as document No. 1058261, and likewise as representatives of the legal holders and own-

ers of all other bonds secured by said mortgage deed of trust except such of them as have intervened in this cause in their own behalf; and for the defendants Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp and The Northern Trust Company as trustee under the last will and testament of Adele C. Stone, deceased, in their own right as legal holders and owners of certain bonds secured by said mortgage deed of trust recorded as document No. 1693161, and likewise as representatives of the legal holders and owners of all other bonds secured by said mortgage deed of trust except such as have appeared in this cause in their own behalf.

908 Messrs. Hay & Brown, Solicitors of record for the defendant William Sherman Hay.

Messrs. Butz von Ammon & Marx, Solicitors of record for the intervening petitioner Charles C. Bullock.

Messrs. Sonnenschein, Berkson, Lautman & Levinson, Solicitors of record for the intervening petitioners Aida Lester and Minna Lester.

Sworn to and subscribed this tenth day of February, A. D. 1926.

DAVID A. WATTS
Notary Public.

(Seal)

909 * * * * * *

(Endorsed) Citation Filed Feb 11 1926 at ..... O'Clock .....M. Charles M. Bates Clerk

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 581, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on June 1, 1926, on which the following entitled cause was heard and determined:

Chicago Auditorium Association,

Appellant

vs.

Mark Skinner Willing, and The Northern Trust Company as Trustees, etc., *et al.*

Appellees

No. 3733, October Term, 1926, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Third day of September A. D. 1927.

EDWARD M. HOLLOWAY

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the sixth day of October, 1925, of the October Term in the year of our Lord one thousand nine hundred and twenty-five and of our Independent the one hundred and fiftieth.

And afterwards, to wit: On the sixth day of March, 1926, there was filed in the office of the clerk of this court an appearance of counsel for Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 3733 October Term 1926

Chicago Auditorium Association,

Appellant

—vs—

Mark Skinner Willing, as Trustee, *et al.*

Appellees

The Clerk will enter my appearance as Counsel for the Appellant.

WALTER L. FISHER
WILLIAM W. CASE
134 S. LaSalle St.
Chicago.

Endorsed: Filed Mar. 6, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the eighth day of March, 1926, there was filed in the office of the clerk of this court a Certificate to Exhibits, which said Certificate to Exhibits is in the words and figures following, to wit:

United States of America
Northern District of Illinois } ss.
Eastern Division

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, certain original exhibits in the case entitled Chicago Auditorium Association —*vs*— Ambrose Cramer, Trustee, *et al.* said exhibits are marked as follows, to wit:

PLAINTIFF'S EXHIBITS.

Numbers 33, 34, 37, 39, 43, 45 and 47 to 75, (both inclusive).

DEFENDANT'S EXHIBITS.

Numbers 1 and 6 to 13 (both inclusive) and Chapin Exhibit 1.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, this 6th day of March, 1926.

CHARLES M. BATES
(Seal) *Clerk.*

Endorsed: Filed Mar. 8, 1926 Edward M. Holloway Clerk

And afterwards, to wit: On the thirteenth day of March, 1926, there was filed in the office of the clerk of this court an appearance of counsel for certain appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Number 3733 October Term, 1925

Chicago Auditorium Association, *Appellant,*
vs.
Ambrose Cramer, Trustee, *Et al.* *Appellees.*

The Clerk will enter my appearance as Counsel for Illinois Merchants Trust Company, as Trustee under a Trust Deed from the corporation of the Fine Arts Building dated March 5, 1903, and recorded in the Office of the Recorder of Deeds of Cook County, Illinois, as Document No. 3382697 in Book 8241 of Records, at page 43; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association dated February 1, 1889, and recorded in said Recorder's Office as Document No. 1058261, in Book 2515 of Records, at page 61, and Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association dated February 1, 1892, and recorded in said Recorder's Office as Document No. 1693161, in Book 3916 of Records, at page 145, appellees in the above entitled cause.

FRANK H. MCCULLOCH,
585-231 South La Salle Street,
Chicago, Illinois.

Endorsed: Number 3733 United States Circuit Court of Appeals Chicago Auditorium Association, Appellant, vs. Ambrose Cramer, Trustee, Et Al., Appellees. Appearance of Illinois Merchants Trust Company Filed Mar 13 1926 Edward M. Holloway, Clerk Frank H. McCulloch, 585-231 South La Salle Street, Chicago, Illinois. Central 2386.

And afterwards, to wit: On the seventh day of April, 1926, there was filed in the office of the clerk of this court a Stipulation fixing time for filing briefs, which said Stipulation is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago Auditorium Association, *Appellant*,
vs.
Mark Skinner Willing, as Trustee, *et al.*, *Appellees.*
No. 3733.

It is hereby stipulated by and between the undersigned parties to the above entitled cause that with the consent of the court the time allowed appellant for filing its brief in this cause shall be extended to and including July 26, 1926; that the appellees shall be allowed to file their briefs at any time on or before September 13, 1926; and that any reply briefs of the appellant may be filed on or before September 27, 1926.

WILLIAM W. CASE,
Counsel for Appellant.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Counsel for Appellees Mark Skinner Willing, Trustee, et al.

WATSON WASHBURNE,
JOHN E. GAVIN,
MITCHELL D. FOLLANSBEE,
Counsel for Appellees William A. Slater, Jr. et al.

SAMUEL B. KING and
HARRY R. HURLBUT,
Counsel for Appellees Homer Coolidge Chapin, Trustee, et al.

MCCULLOCH & MCCULLOCH,
Counsel for Appellee Illinois Merchants Trust Company, Trustee.

GEORGE W. GORDON,
Counsel for Appellees First Trust & Savings Bank, et al.

VICTOR ELTING,
Counsel for Appellees Caroline P. McCready, et al.

HAY & BROWN,
Counsel for Appellee William Sherman Hay.

BUTZ, VON AMMON & MARX,
Counsel for Appellee Charles C. Bullock.

SONNENSCHEIN, BERKSON, LAUTMAN & LEVINSON,

.....

Counsel for Appellees Aida Lester, et al.

LOUIS M. GREELEY,
Guardian ad Litem for Appellees Margaret Willing, et al.

ROSWELL B. MASON,
Guardian ad Litem for Appellees John Fox Slater, Jr. et al.

HENRY RUSSELL PLATT,
Guardian ad Litem for Appellees Holland Bishop, et al.

Endorsed: General No. 3733. U. S. Circuit Court of Appeals, Seventh Circuit. Chicago Auditorium Assn. v. Mark Skinner Willing, et al. Stipulation. Filed Apr. 7, 1926. Edward M. Holloway, Clerk. Fisher, Boyden, Kales & Bell, 134 S. La Salle Street, Chicago. Telephone Franklin 2325.

And on the same day, to wit: On the seventh day of April, 1926, the following further proceedings were had and entered of record, to wit:

Wednesday, April 7, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.

Chicago Auditorium Association
3733 *vs.*
Mark Skinner Willing, as Trustee, *et al.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Pursuant to stipulation of the parties to this cause, it is hereby ordered that the time allowed appellant for filing its brief in this cause is hereby extended to and including July 26, 1926, that appellees shall be allowed until and including September 13, 1926 to file their briefs herein; and that any reply brief of the appellant may be filed on or before September 27, 1926.

And afterwards, to wit: On the twenty-sixth day of April, 1926, there was filed in the office of the clerk of this court an appearance of counsel for certain appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733. October Term, 1926.

Chicago Auditorium Association, a corporation,
Appellant,

vs.

Mark Skinner Willing and Northern Trust Company, Trustees, etc., *et al.*,
Appellees.

The Clerk will enter my appearance as counsel for Mark Skinner Willing and Northern Trust Company as Trustees of the will of Henry J. Willing, deceased, and Mark Skinner Willing, individually, appellees.

SAMUEL TOPLIFF,
HOMER H. COOPER,
105 South La Salle Street,
Chicago, Illinois.

Endorsed: Filed April 26, 1926. Edward M. Holloway, Clerk.

And afterwards, to wit: On the twenty-fifth day of August, 1926, there was filed in the office of the clerk of this court an appearance of counsel for certain appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733. October Term, 1925.

Chicago Auditorium Ass'n,

Appellant,

vs.

Mark Skinner Willing, *et al.*,

Appellees.

The Clerk will enter my appearance as Counsel for the Appellees, Wm. A. Slater, Charles L. Harrison, and Halsey Malone, Trustees, etc., and Ellen B. Slater, Elizabeth Sears Warren, *et al.*

MITCHELL D. FOLLANSBEE,
ROBERT W. SCHUPP,
JOHN E. GAVIN,
137 So. LaSalle St.,
Chicago.

WATSON WASHBURN,
36 W. 44th St.,
New York City.

Note.—Must be signed by a member of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual and not firm names must be signed.

Endorsed: United States Circuit Court of Appeals For The Seventh Circuit. No. 3733. Appearance for Certain Appellees. Filed Aug. 25, 1926. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the city of Chicago in said Seventh Circuit on the fifth day of October, 1926, of the October Term in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the one hundred and fifty-first.

And on the same day, to wit: On the fifth day of October, 1926, the following further proceedings were had and entered of record, to wit:

Tuesday, October 5, 1926.

Court opened by proclamation of crier.

Present:

Hon. Evan A. Evans, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Chicago Auditorium Association	)	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
3733 *vs.*	)	
Mark Skinner Willing, *et al.*	)	

It is ordered by the court that this cause be, and the same is hereby set down for hearing Friday, November 5, 1926.

And afterwards, to wit: On the fifth day of November, 1926, the following further proceedings were had and entered of record, to wit:

Friday, November 5, 1926.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

3733 Chicago Auditorium Association *vs.* Mark Skinner Willing, *et al.* } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Walter L. Fisher, counsel for appellant, and by Mr. Homer H. Cooper, Mr. Watson Washburn and Mr. Frank H. McCulloch, counsel for appellees, and the court having heard the same takes this matter under advisement.

And afterwards, to wit: On the seventh day of June, 1927, there was filed in the office of the clerk of this court, the opinion of the court, which said opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733. OCTOBER TERM, 1926, OCTOBER SESSION.

CHICAGO AUDITORIUM ASSOCIATION, *Appellant,*

vs.

MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY, as Trustees, Etc., *Et Al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 7, 1927.

Before ALSCHULER, EVANS and PAGE, *Circuit Judges.*

EVANS, *Cir. J.:* This appeal involves solely a question of equity jurisdiction. The district court dismissed the suit concluding that the alleged facts were insufficient to invoke the jurisdiction of a court of equity. It did not pass upon the existence of facts necessary to sustain the relief sought, providing the court had jurisdiction. In other words, two questions were presented to the district court. One was a question of law—the sufficiency of the allegations of the bill to invoke the court's jurisdiction. The other was one of fact —the sufficiency of the evidence to justify the relief sought. Having ruled adversely to appellant on the first question, the district court made no findings on the second question.

It was agreed in this court,—though the briefs are not so limited,—that we should pass on the first question only; and in case we held for the appellant the cause should be returned to the district court, that the issues of fact might be there tried and determined.

Judge Wilkerson, in his opinion (8 Fed. (2), 998), has so well and fully stated the facts as to meet the approval of both counsel. We adopt the statement thus made.

Speaking in a general way, appellant, at the outset of this argument, is confronted by two contentions which it must meet—either one of which, if sustained, will be fatal to the maintenance of this suit. Both of them were upheld by the district court. They are:

(a) The facts as alleged in the bill are insufficient to invoke the jurisdiction of a court of equity.

(b) The bill seeks nothing but a declaratory decree.

Perhaps the two objections are not so unrelated as might at first appear.

Appellee's position under the first objection may be stated in a quotation from *McElroy* v. *Masterson*, 156 Fed. 42:

> "The bill of complaint should be dismissed, unless it can be maintained that there is a comprehensive discretion reposed by modern equity jurisdiction in the chancellor to make and unmake contracts of parties, *sui juris*, constrained only by no other limitations than those which meet the approval of his conscience. Courts of equity are now as much required as courts of law to enforce contracts free from vitiating elements of fraud, and to refrain from making contracts for the parties on which their minds never met.
>
> In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development equity jurisdiction has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable".

To use their own language:

> "Long settled rules bound the exercise of equity jurisdiction, and, broad though they are, they do not validate invocation of an unlimited fount of remedies for any and all predicaments. Appellant would expand equity into *arbitrium boni viri*, a conception freely translatable as the decision upon the peculiar facts which would be made by a man of intelligence and good character regardless of settled law. If that system of administering justice ever be accepted, every decision becomes a virtual arbi-

tration, all certainty of lawful rights and obligations is prevented, and constitutional limitations upon the powers of courts are swept away.

"Hence the requirement that a plaintiff must predicate his prayer for relief upon some settled principle or head of jurisdiction constituting the department of equity.

"Observance of these rules affords security and stability to vested rights. Disregard means confusion, uncertainty and, in this instance, unlawful taking of property."

Appellant challenges these limitations to equity jurisdiction, and asserts in the language of Pomeroy—Equity Jurisdiction, 4th Edition, Section 62:

"The whole question by which the extent of the equity jurisdiction is practically determined is no longer, whether the case is omitted by the law, or the legal rule is unjust, or even the legal remedy is inadequate—although the latter inquiry is still sometimes made and treated as though it were controlling,—the question is, whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity. * * * A court of equity will not, *unless perhaps in some very exceptional case,* assume jurisdiction over a controversy, the facts of which do not bring it within some general principle or acknowledged head of equitable jurisprudence."

To this statement counsel add their own views of the present litigation:

"While we think there should be no necessity of so doing, we expect to show that if the bill in this case discloses meritorious grounds for equitable relief, there is nothing to prevent the Court, should it prefer that alternative, from accrediting the bill with a conventional name. It may be convenient for ordinary purposes of reservation to have at hand a cabinet of standard labels, but our position is that no such catalogue can deprive equity of its fundamental and most valuable attraction of administering relief according to the exigencies of each case as it arises."

While the opposing counsel thus approach the controversy at issue from different angles, they do not differ widely when they reach the narrow issue here involved.

While it may be, and in most instances is entirely satisfac-

tory and practical to predicate jurisdiction upon our ability to bring the facts within some recognized head of equity jurisdiction, we cannot believe that the doors opening to the courts of equity are numbered, or labeled, or limited. The origin and growth and entire history of equity jurisdiction repels the conclusion that it has ceased to grow, or that only those cases may be recognized which fall within the heretofore existing heads or branches of equity.

Perhaps these foregoing abstract statements have been pursued too far, for, after all it is asserted by appellant's counsel that its cause falls under one of the recognized heads of equity,—namely a bill to remove a cloud on title. In fact it may be that the so-called enlargement of equity jurisdiction applies more to the rules governing these recognized heads of equity jurisdiction, and to the remedies and the relief obtainable thereunder, than to the general subject of equity jurisdiction.

Further concessions on the part of appellant, that the equity jurisdiction of the district court, from which this appeal is taken, has not been enlarged by any statute of the state of Illinois; that its bill is not a bill of peace, or a bill to relieve from a declared forfeiture, or a bill *quia timet*, or one to enjoin a breach of contract, narrow the issue. In other words, it asserts that while "its right to relief" is "one of substance and not of form", yet if "an old label" must be applied "it is a bill to remove a cloud on title". It asserts that its bill alleges the existence of the three necessary facts which, when present, invoke the jurisdiction of a court of equity: (1) the existence of a substantial property right; (2) present or imminent deprivation of the beneficial use and enjoyment of that right; (3) lack of adequate legal remedy to protect the owner of such right in the use and enjoyment thereof.

Citations of authorities are hardly necessary to sustain the proposition that in a proper case equity will relieve a holder of real estate from the injury or damages which arise from the presence of a hostile or adverse claim. *Holland* v. *Challen*, 110 U. S. 15; *McArthur* v. *Hood Rubber Co.*, 221 Mass. 372.

The objections to the bill as one to remove a cloud on title may be considered under the following four heads:

(a) Appellant's title under the Illinois decisions was not a legal title and, therefore, not susceptible of being clouded.

(b) No hostile or adverse claim is asserted by any appellee, and, therefore, no cloud exists.

(c) Whatever adverse claim or cloud is alleged to exist

grew out of the very instrument which constitutes the basis of appellant's title, and being in the same instrument, it is not a cloud of title removable in equity.

(d) If doubt respecting appellant's title exists by virtue of certain provisions of the lease, then appellees' claim is more than a cloud, and the parties must resort to an action at law to determine the same.

(a) Appellant's interest in the real estate involved consists of several leases, some for 198 years and others for 99 years. Appellees insist that under the Illinois law these leases are chattels (*Chicago* v. *Tribune Company,* 248 Ill. 242; *Thornton* v. *Mehring,* 117 Ill. 55) and do not convey an interest in land. From this fact they argue that equity will not grant relief to a mere holder of a chattel, a lessee for a term of years.

There are two answers to this contention. The first one assumes that appellant's leases are mere chattels, the other assumes they are chattels real, as defined by Judge Wilkerson.

Assuming the leases to be chattels, we adopt the rule announced in many well considered cases and contended for by Pomeroy (Pomeroy's Equitable Remedies, 2nd Ed., section 2151) and hold that equity will take jurisdiction to relieve against a cloud even though the subject matter be personal, rather than real, property.

Suits to remove cloud on title where the property is personal have been repeatedly sustained. *Magnuson* v. *Clithero,* 101 Wis. 551; *Voxx* v. *Murray,* 50 Ohio State 19; *Sherman* v. *Fitch,* 98 Mass. 59; *Martin* v. *Maxwell,* 86 S. C. 1; Pomeroy's Equitable Remedies, Section 369; *Thompson* v. *Emmet Irrigation District,* 227 Fed. 560; *Rosenbaum* v. *Foss,* 4 S. D. 184, 56 N. W. 114; *N. Y. & N. H. Railroad* v. *Schuyler,* 17 N. Y. 592; *Stebbins* v. *Perry County,* 167 Illinois 567.

Precedents rather than logic sustain the distinctions made between real and personal property as the subject matter of suits to remove clouds on title.

This conclusion is, of course, fortified by the fact that the lease under consideration is, after all, a chattel real. It conveys an interest in land, *People* v. *Shedd,* 241 Ill. 155, though for some purposes it may be described as a chattel.

We conclude that appellant's leases form such a substantial property right as entitled it to admittance into a court of equity and to relief therefrom other necessary facts being present. *Johnson* v. *Samuelson,* 82 Neb. 201, 130 A. S. R. 666;

German-American Savings Bank v. *Gollmer,* (Cal.) 24 L. R. N. (N. S.) 1066.

More serious are the objections (b) and (c) which will be considered together.

It is admitted that the cloud on appellant's title, if any exists, arose out of the same instrument that created appellant's title. That such fact alone robs equity of its jurisdiction, appellant denies.

Decisions are cited which support appellees' contention. We are at a loss, however, to understand why such a rule should prevail. Why must the cloud appear in an instrument other than the one upon which appellant relies for its title? The basis of equity jurisdiction, the reasons which originally, and have since, induced courts of equity to act to remove clouds on title are in no way connected with, or predicated upon, the separate and isolated character of the written document that creates the cloud. It may be admitted that removable clouds most frequently appear in instruments other than the one through which complainants trace their title. In fact it no doubt frequently occurs that if a single instrument creates the plaintiff's right and also the so-called cloud, the assertion of the latter *necessarily* casts such doubt upon appellant's title as to require a denial of the relief sought. Particularly is this true where the cloud is found in the granting clause of appellant's title. This was apparently the situation in *First Congregational Church* v. *Page,* 257 Ill. 472, for the court said:

> "It would be a rather anomolous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument under which he claims."

We are not satisfied that the existence of a common instrument creating appellant's title and appellees' cloud calls for a refusal of a court of equity to act. Rather should the question be determined by an examination of the document to ascertain whether the so-called cloud is one which a court of equity should remove, and also whether the so-called cloud impairs appellant's title or rights, or casts such doubt upon it as to require a denial of the relief sought.

Examining the appellant's muniment of title, its leases, we find that it has an unqualified grant for 99 years, (in most part 198 years), of a right to occupy the land described. In other words, it is given a lease of land located in the heart of Chicago, which property is of large value, and in consideration thereof it is required to pay a large sum of money as

rental. The mere grant of the right to occupy the land for a large cash rental gives rise to the inference that the occupants were to use the land rather than to permit it to lie idle. The use of such property in a city like Chicago, and at the date this lease was executed, (the real estate being in the business district), leaves no room for doubt that such property thus leased was to be used as the foundation for a building, for the use of which rentals were to be collected. While this would be the unavoidable deduction to be made from the execution of the lease, other provisions of the lease conclusively establish the correctness of this deduction.

In the absence of any provision in the lease itself, it is likewise hardly conceivable that a lease for 198 years, or even one for 99 years, should be so construed as to deny to the lessee the right to rebuild as changing conditions require.

It may be conceded that modern structures are more or less permanent. They are more so now than in 1889 when the leases were executed. But the changes in the building art in the last forty years, of which the court can and will take judicial notice, justify the conclusion that permanency in buildings is but a relative term, and particularly so in a city like Chicago.

In short, appellant shows it possessed valuable rights; that their existence was neither doubtful nor uncertain; that the enjoyment of these rights was possible only through the use of the rented ground as the site for a building; that the location of the property, its large value, the size of the rentals, and the taxes conclusively negative the possibility of the lease being executed save for commercial purposes. And it then follows, as an unavoidable deduction from the grant for a lease for 198 years, that the building or buildings which were to be constructed thereon should, from time to time, be repaired, and at *some time* during the existence of the lease be *replaced* by new buildings.

Appellant alleges that it is unable to rebuild because of the cloud on its title occasioned by certain provisions in the lease, and the appellees' position in respect to such provisions. It seems to us that appellant, in making these allegations, has gone far toward establishing its right to have a court of equity hear the evidence.

Appellees insist that there is no cloud on appellant's title; that no verbal position taken by any of them can create a cloud removable in a suit of this character. It further contends that if this position is not sound, then the so-called cloud is not such a one as the law contemplates, but instead throws

such doubt on appellant's claim as defeats its right to bring this suit.

First let us consider the nature of the alleged cloud and then determine whether it comes within the legal definition of a cloud on title.

Bearing in mind that the enjoyment of this lease is dependent upon appellant's right to build a structure of suitable size and character to meet the needs of the community, it is apparent that appellant must finance the cost of such a building. To do so, it must have an unhampered entrance into the money market. To raise fifteen or twenty millions of dollars, the builder's title must not only be free from doubt but free from the suspicion of doubt. A cloud on title is a relative term. What may be passed as merchantable under certain conditions would be rejected under different circumstances.

But no examiner of title could, or would, have the temerity to urge that a provision against building, or a provision which an adverse party insists is against rebuilding, casts no cloud on the title of a 198 year leasehold. And too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile assertion by an adverse claimant, be the basis of a cloud on title.

What then are the requirements of an adverse claim that will make it a cloud on title, as that term is used in courts of equity in suits of this character? What is the cloud of which appellant complains?

Upon the first question the decisions may be divided into the strict and the liberal holdings. From the latter, which we are inclined to follow, we conclude that a hostile or adverse claim becomes a removable cloud if it impairs the merchantability of appellant's title, materially affects the marketability of appellant's property, or defeats or impairs the legitimate use and enjoyment of appellant's property, which includes its right to construct a suitable building thereon, so that the maximum rental may be secured. The following are a few of the many decisions available. *McArthur* v. *Rubber Co.* (Mass.) 109 N. E. 162; *Witt* v. *Sims* (Ga.) 78 S. E. 467; *Johnson* v. *County* (Mont.) 146 P. 471; *Hawes* v. *Clarke*, 144 N. Y. S. 11; *Deckenbach* v. *Deckenbach* (Ore.) 130 P. 729; *Campbell* v. *Disney* (Ky.) 18 S. W. 1027; *Kittle* v. *Bellegarde* (Cal.) 25 Pac. 55; *Palmer* v. *Yorks*, (Minn.) 79 N. W. 587; *Pacific Coast Pipe Co.* v. *Hedican* (Wash.) 112 Pac. 655; *Bird Timber Co.* v. *Snohomish County* (Wash.) 152 Pac. 689; *Fox*

v. *Williams* (Wis.) 66 N. W. 357; *Broderick* v. *Cary* (Wis.) 74 N. W. 95.

In *McArthur* v. *Hood Rubber Co., supra,* the court says,

> "Whenever a deed or other instrument exists which may be used to vex or injure the owner, or which may cast a suspicion upon his title or interest and he cannot immediately protect or maintain his right fully and completely by proceedings at law, then a court of equity will afford relief by a decree of such scope as justice may require to adjust the rights of the parties."

It is true that many of these decisions (though not the Massachusetts case) are under statutes that are broad and inclusive in their language. Doubtless these statutes have had a large influence in determining the character of a hostile claim removable as a cloud on title. But whether the causes be traced to these statutes, or, as in the Massachusetts case, to the necessities of society, courts have given to an adverse or hostile claim a definition far more inclusive than the one which obtained several decades ago.

Appellant also alleges that appellees take the position that the clauses deny to the appellant the right to replace the present building with a new and modern structure. It is not contending that appellee's verbally stated position alone constitutes a cloud. It is appellees' position respecting the lease, this written document of record, (which position is manifested by oral pronouncement, and by their refusal to consent to the rebuilding) *in addition to the clauses,* that creates the infirmity in appellant's asserted right and defeats, or at least impairs, its enjoyment of its lease.

It seems to us that this constitutes a removable cloud on title.

Plaintiff's right must be clear. But the certainty of such right must be determined in the first instance by the allegations of the bill, (unless they charge conclusions or facts from which different conclusions are unavoidable), and not by the facts which ultimately may develop when the Chancellor hears the evidence. There is nothing illogical or fatally weak in appellant's allegations that this clause, together with appellees' stand under it, impairs its ability to finance the undertaking, without which it cannot rebuild.

Several clauses of the lease are herewith quoted.

> "All columns shall be of iron, stone or brick, and all iron and steel columns and girders shall be fireproofed with a covering of porous terra cotta or hollow tile, or like material; all beams, joists and roofing beams and

joists shall be of iron or steel; all constructural floors shall be arches of hollow tile or like materials; all partitions shall be of brick or hollow tile; the roof shall be iron, brick or hollow tile; the stage of the auditorium in said building, however, may be built of such material and in such manner as may seem most expedient to party of the second part.

"And the said party of the second part further covenants and agrees that it will at all times during the term hereby demised, at its own proper cost and charges, keep the building situated upon said demised premises, and all appurtenances belonging thereto, in good repair, and in a safe and secure condition, and that it will keep all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease.

"If said buildings, or any part thereof, shall at any time or times during the continuance of the term hereby granted, be destroyed or damaged by fire, the party of the second part shall rebuild or repair the same upon the same plan as before the said fire happened, or such other plans as by the party of the first part shall be approved in writing and have the same rebuilt and ready for occupancy within two years from such loss or destruction. And that as often as said buildings or improvements shall be burnt down or damaged by fire, all and every sum or sums of money which shall be recovered or received by the party of the second part for or in respect of said insurance, shall be laid out by it in rebuilding or repairing said building.

"That in the event of the determination of this lease at any time before the expiration of the term of ninety-nine years hereby demised, for the breach of any of the covenants herein contained, then and in such case all buildings, fixtures and improvements, then situate upon said demised premises, shall belong to and be the property of said lessor; and no compensation therefor shall be allowed or paid to said lessee."

The leases provide for appraisal at the expiration of the term of the "actual cash value of any and all buildings," etc.

"In making said appraisement of the value of said improvements, the appraisers or Court shall take into consideration the suitableness of said improvements as to character and condition to secure the largest returns from the demised premises to the owner thereof, and the appraised value of said improvements shall in no case ex-

ceed the difference between the value of the entire property, land and improvements as a whole, and the value which said demised premises would then have if vacant."

Appellant in open court agreed to waive this last quoted provision and to forego the payment of the sums thus fixed as the value of the improvement.

Inasmuch as these clauses do not specifically deny appellant's right to rebuild it is argued that they, like the ordinary document void on its face, furnish no basis for this suit.

There are numerous authorities, particularly under state statutes, that hold an instrument void on its face may be a sufficient cloud to sustain a suit to remove it. See cases cited above.

The clauses complained of herein, however, are not void. Moreover, there is sufficient doubt, faint or substantial, to impair, as the bill alleges, plaintiff's use and enjoyment of its leasehold.

(d) Has plaintiff an adequate remedy at law? If it has we, at least, have been unable to find it. It has invested a large sum of money in this leasehold. It has paid many hundreds of thousands of dollars in rent and taxes. It has constructed a building according to plans which met with the approval of the architects at the time the structure was designed. The building no longer serves its purpose. The structure is insufficient. The foundations have sunk so as to impair its safety. It is not in accord with the prevailing and accepted building art of today. In order that the rents and taxes may be paid, there must be additional stories erected. They cannot be safely added upon foundations as they exist. These are the allegations of the bill.

Is it an adequate remedy to say to the plaintiff—you may tear down your building, in which case an action at law will be brought against you, and if your contentions are not upheld, you will be ousted, and all you have invested will be lost. True, this court cannot make contracts for the parties. It cannot remake leases for competent parties who have contracted. But it can, and does, say that plaintiff's remedy at law is not adequate when it must stake its entire investment, risk loss of its leasehold perhaps, as a condition upon which it may judicially ascertain its legal rights.

In determining whether appellant has an adequate remedy at law, it is important to bear in mind the word "adequate." Complainant may have redress at law but such remedy may nevertheless be inadequate. 10 R. C. L. 275; *Haines* v. *True-*

blood et al. (Ind.) 119 N. E. 382; *Union Pac. R. R. Co.* v. *Weld County,* 247 U. S. 282-285, 286.

It has been held that a remedy at law is inadequate unless it be in the control of the party seeking relief. Delay alone may furnish sufficient justification for a successful appeal to equity, and delay is unavoidable and its duration uncertain where a resort to legal redress is dependent on the action of an adversary. *Fredenberg* v. *Whitney,* 240 Fed. 823; *Bank of Kentucky* v. *Stone,* 88 Fed. 383.

The rule is stated in *Fredenberg* v. *Whitney* thus:

> "In these days of industrial expansion, parties should have a right to have any issue which involves their financial status speedily adjusted, and this right should not be permitted to rest upon the discretion of the other party, and a legal remedy, to be adequate, must be a remedy which the party himself controls and can assert at the moment. When there is a doubt in the mind of the chancellor as to the adequacy of the remedy, that doubt should be resolved in favor of the petitioners."

In the present suit, it is true, appellant may provoke appellees to action. It may so act as to give each of them a right to institute an action in law. But such a course will occasion vexatious and unavoidable delays due to the number of actions that must be instituted and tried.

Throughout this opinion we have endeavored to avoid its undue prolongation by an analysis of the numerous decisions cited which bear upon the legal questions involved. The decisions are without number that deal with the question of equity jurisdiction. It would be a hopeless task to attempt to analyze each one or even to satisfactorily reconcile them. Two cases, however, deserve special attention for, if it be necessary to fortify or sustain our conclusions by judicial precedents, then these decisions merit citation. The two cases are *Rector* v. *Rector,* (N. Y.) 94 N. E. 191 and *McArthur* v. *Hood Rubber Co.* (Mass.), 109 N. E. 162.

Both cases are authority for the conclusion here reached that a removable cloud on title may arise in the instrument through which plaintiff traces its title. They also support the position that a negative covenant may constitute a removable cloud on title. Both opinions are vigorously assailed. The Rector decision, it is argued, was by a divided court; and it is contended that the McArthur case was later overruled by the same court.

The attack on the Rector decision because it was rendered by a divided court needs no answer except to observe that we are interested in the soundness of the principle announced rather than in an academic discussion of the weight accordable to opinions of the majority of divided courts.

We appreciate that this decision may well be called an advanced one. ("A novel one" 22 Howard Law Review 543.) Its persuasiveness, however, lies not in its isolation or in its uniqueness, but in its appeal to conscience.

We do not agree that the decision in the McArthur case was overruled by the *Riverbank Improvement Co.* v. *Chadwick* (Mass.) 117 N. E. 244. The issues were different in the two cases.

In this opinion we have refrained from stating appellees' fact position regarding the clause in the lease. We have done so for the reason that we are not concerned with the controverted facts bearing on this issue. We want the district court to know that we have not in any way intimated our views respecting these facts, or the persuasiveness of the facts on either side. Our sole question is to determine whether a court of equity should take jurisdiction of the suit. The trial court must determine whether the facts justify the relief sought. And its approach to this question should be uninfluenced by anything we may have said on the legal question here under consideration.

MORTGAGEES.

The trust company representing the bondholders has a lien in the building and it has joined the fee owners in objecting to the court's jurisdiction.

There is no controversy as to the existence of such mortgage, and the legal question it presents can not be ignored. Mortgagee asserts its position to be one with vested rights that cannot be disturbed without its consent. But in what is the mortgagee interested? Wherein is it prejudiced? It is interested in its lien—nothing more. Its lien covers the leasehold to the extent of about $1,250,000.00. The building in question adds to its security, hence, its interest. But it is in the security, nothing more, that it is interested.

While it is hard to see how its security may be impaired, yet, relying on the letter of its bond, it asserts that the security may not be changed without its consent.

But, if appellant's position is correct, the mortgagee took its bonds subject to appellant's right to replace the present structure with a new one. If the right to rebuild is an im-

plied right rising from the grant of a 198 year lease, wherein has a mortgagee any legitimate complaint if the mortgagor does rebuild, and as here, offers to deposit a bond or cash to protect the mortgagee.

Appellant's right to maintain the suit is predicated upon its implied right to rebuild, which arises from the grant of a 198 year lease. Such right, if it exists at all, appeared in the recorded title of the mortgagor when the mortgage in question was executed. Mortgagee cannot now complain of the exercise of a right of which it had notice. Particularly is this so where, as here, the mortgagee offers cash or bond security in twice the amount of the mortgage during the period of construction, or until such time as the court fixes.

If the trial court, upon trial of the issue of fact, ultimately determines that appellant has no right to replace the Auditorium building with a new structure, then, of course, the mortgagee's objection to its so doing will be sustained.

This brings us to the second objection advanced by appellees.

Does appellant ask merely for a declaratory decree construing its lease and establishing its rights thereunder?

Many cases have been cited (*Muskrat* v. *United States*, 219 U. S. 346; *United States* v. *Alaska Steamship Co.*, 253 U. S. 113; *United States* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466; *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308) and many others might be added, holding that a court is empowered to hear only actual controversies. They cannot pronounce declaratory decrees which decide abstract propositions for the future guidance of parties interested. But if the instant suit is properly cognizable in a court of equity,—one to remove a cloud on title,—and we hold that it is,—it may be maintained and is distinguishable from the above cited decisions upon which appellees rely.

We cannot close this opinion without expressing our appreciation of the particularly able and helpful briefs which counsel for both sides have submitted.

The decree is reversed with direction to the district court to hear the evidence and determine the issues involved.

And on the same day, to wit: On the seventh day of June, 1927, the following further proceedings were had and entered of record, to wit:

Tuesday, June 7, 1927.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Hon. Albert B. Anderson, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Chicago Auditorium Association

3733 *vs.*

Mark Skinner Willing, and The Northern Trust Company as Trustees, under the last will and testament of Henry J. Willing, deceased, Mark Skinner Willing, Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr., also William A. Slater, Jr., E. Halsey Malone and Charles Lewis Harrison, as Trustees under the last will and testament of William A. Slater, deceased, Ellen B. Slater, William A. Slater, Jr., John Fox Slater, Eleanor Malone, Elena De Struve, Boris De Struve and Adrian Malone, also Bayard Warren and Bayard Tuckerman, Jr., as Trustees, Elizabeth Sears Warren, Bayard Warren, Jr., Lily Warren, Camilla Warren, Caroline Sears Warren, Phyllis Sears Tuckerman, Phyllis Tuckerman, Richard Mortimer Tuckerman, and Herbert Tuckerman; also Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Helen Evelyn Chapin Bishop, Henry Kent Chapin, Ruby Chapin Pitner, Lowell Mead Chapin and Charles Douglas Chapin, all as Trustees under the last

will and testament of Charles A. Chapin, deceased, Homer Coolidge Chapin, Sarah Lucile Chapin Smith, Charlotte Gardiner Robertson, Helen Evelyn Chapin Bishop, Helen Emily Bishop, Holland Bishop, Ruby Bishop, Charles Chapin Bishop, Henry Kent Chapin, Henry Kent Chapin, Jr., Charles A. Chapin, Ruby Chapin Pitner, Lowell Mead Chapin, Elizabeth Chalifoux Chapin, Coolidge Mead Chapin, and Charles Douglas Chapin, also Illinois Merchants Trust Company as Trustee under a certain trust deed from The Corporation of the Fine Arts Building dated March 5, 1903, and recorded in the office of the Recorder of Cook County, Illinois in Book 8241 of records, at page 43 as document No. 3382697; also First Trust & Savings Bank, George Higginson, Jr. and Columbus Healy, in their own right and as representatives of the legal holders and owners of all bonds secured by said trust deed; also Illinois Merchants Trust Company, as Trustee under two certain mortgage deeds of trust from Chicago Auditorium Association, one dated February 1, 1889 and recorded in the office of the Recorder of Cook County, Illinois, in Book 2515 of records at page 61, as Document No. 1058261, and the other dated February 1, 1892 and recorded in said Recorder's office in Book 3916, of records at page 145, as Document No. 1023161; also Caroline P. McCready, The Northern Trust Company as Trustee under the last will and testament of Mary E. Shields, deceased, Edwin A. Seipp and The Northern Trust Company as Trustee under the last will and testament of Edward W. McCready, deceased, in their own right, and as representatives of the legal holders and owners of all bonds secured by said mortgage deed of trust recorded as Document No. 1058261; also Charles S. Dewey, Edwin A. Seipp, William C. Seipp, Clarence T. Seipp, and The Northern Trust Company as Trustee under the last will and testament of Adele C. Stone, deceased, in their own right, and as representatives of the legal holders and owners of all bonds secured by said deed of trust recorded as Document No. 1023161; also William Sherman Hay, Defendants, and Charles C. Bullock, Aide Lester and Minna Lester, Intervening Petitioners.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said District Court with direction to hear the evidence and determine the issues involved.

And afterwards, to wit: On the twenty-fifth day of June, 1927, there was filed in the office of the clerk of this court a Petition for a Rehearing, which said Petition for a Rehearing is in the words and figures following, to wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1926.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, *Appellant*, vs. MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, Etc., et al., *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES FOR REHEARING.

GEORGE-BANNER PRINTING COMPANY, CHICAGO.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1926.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, *Appellant,* *vs.* MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, Etc., et al., *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES FOR REHEARING.

To the Honorable Justices of the United States Circuit Court of Appeals for the Seventh Circuit:

And now come:

Mark Skinner Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, deceased; and Mark S. Willing, by Samuel Topliff and Homer H. Cooper, their solicitors;

William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, deceased; Bayard Warren, Jr., and Bayard Tuckerman, Jr., as Trus-

tees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman, by Mitchell D. Follansbee, Watson Washburn and John E. Gavin, their solicitors;

Illinois Merchants Trust Company as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903, etc.; Illinois Merchants Trust Company as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1889, etc.; Illinois Merchants Trust Company as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1892, etc., by Frank M. McCulloch, its solicitor;

Louis M. Greeley, Guardian *ad Litem* of Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.; and

Roswell B. Mason, Guardian *ad Litem* of Infant Defendants John Fox Slater, Elena De Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, by Henry G. Miller, his solicitor:

and pray the court for a rehearing in above entitled cause for each and all of the reasons herein following set forth.

I.

THE DECISION OF THE COURT IS ERRONEOUS.

Much of the court's holding is summed up in this sentence on Page 8 of its opinion:

> "And, too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile assertion by an adverse claimant, be the basis of a cloud on title."

Here is a new doctrine—new law. The holding surpasses both the *Rector* v. *Rector* and *Hood Rubber Com-*

pany decisions. In those, which are the only cases remotely like the case at bar, the courts struck down explicit covenants. In the former, where statutory jurisdiction existed, the isolated holding is not in accord with other decisions of New York. In the latter, the hearing was *ex parte*. Here we have no explicit covenant to be stricken. At most we have numerous clauses susceptible of varying constructions, which the appellant desires the court to construe, not to strike down. And the "assertion" of our "adverse claim" is not hostile, as courts define legal hostility; nor did our denial of appellant's claims ever appear except in answer to the prior voluntary challenge of appellant. Can it now be that this court holds a tenant can *create* a removable cloud by orally questioning *his own* title?

However the answer may appeal to conceptions of What-ought-to-be-the-law, all you have and all you ever can make of the issue is a difference of opinion as to the rights of parties under a contract. The very first step in so-called adjudication is to construe the leases. When you have done that, with due regard for all the facts, you are through—completely through. All else is subsidiary. The case is ended. You find, if you try to draft a decree for the appellant, that you have simply declared the rights of the parties. Nothing concrete, nothing that *any* court heretofore ever defined as a cloud, has been removed.

Nevertheless, the court says that where the construction of the only instrument under which a plaintiff holds title is doubtful, though the doubt be a forced one, and a defendant takes a vocal position in opposition to the plaintiff's ideas, a bill to settle the argument is a bill to remove a cloud from the plaintiff's title. That holding, we submit, is not supported by any decision of a

federal court and is contrary to the unbroken law of the state where the property lies.

In *Guffey* v. *Smith*, 237 U. S. 101; in *Holland* v. *Challen*, 110 U. S. 15; in *Clarke* v. *Smith*, 38 U. S. 195, and in many other cases, the Supreme Court has said local law controls federal courts in dealing with local property rights. And in *Parker* v. *Shannon*, 114 Ill. 192; 121 Ill. 452; in *Rigdon* v. *Shirk*, 127 Ill. 411; in *McCarty* v. *McCarty*, 275 Ill. 573, and in *Greenough* v. *Greenough*, 284 Ill. 416, the highest Illinois court has held that in Illinois an oral assertion of title by an adverse claimant, accompanied by great violence (*Parker* v. *Shannon*), and based upon *admitted*, not forced, doubtful construction of the plaintiff's instrument, is *not* a removable cloud.

Seemingly this court disposes of the above precedents and their plain rules under its classification of "the strict" holdings (page 8 of opinion) and deliberately follows the flicker of a pronounced minority of "liberal holdings" in states other than the state where our real estate is situated. Is not this a strange practice for a federal court which, if its jurisdiction is doubtful, ordinarily declines to act? And is it not stranger still for a federal court to ignore the teachings of the Supreme Court which dictate that local law governs definition of title to local property?

The opinion says the court is at a loss to understand why jurisdiction is uniformly denied where the alleged cloud grows out of the very instrument constituting the basis of the plaintiff's title, as here. The court quotes (opinion, p. 6) from *First Congregational Church* v. *Page*, 257 Ill. 472—"It would be a rather anomolous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument un-

der which he claims"—and observes: "We are not satisfied that the existence of a common instrument creating appellant's title and appellees' cloud calls for a refusal of a court of equity to act." With all deference, we submit that here this court errs most.

When the court must find the basis of the plaintiff's claim and the basis of the defendants' denial of that claim both within the confines of the plaintiff's muniment of title, the court must first of all determine the plaintiff's own right before it can proceed to consideration of the defendants' alleged wrong. That is to say, the court must first construe the instrument. But a bill to remove a cloud is relief against a defendant who impairs a right the plaintiff *clearly has*. It is not, and must not be, in any degree, an adjudication of the existence or validity of the plaintiff's *own* right. The suit *presupposes* the clear validity and complete existence of the plaintiff's title, and is directed exclusively against the alleged invalid adverse claim of the defendant. All the evidence, all the rules of law, everything involved in the lawsuit, are confined absolutely to an inquiry as to the existence and invalidity of the defendant's claim. So, whenever, as here, the initial inquiry is compelled to be an inquiry as to the existence and validity of the plaintiff's own primary right, then is the court asked to adjudicate the plaintiff's title and not to remove any cloud. That this is the law, and that the court has no such power or jurisdiction in a suit brought to remove clouds, are expressly stated by the Supreme Court in the case of *Phelps* v. *Harris*, 101 U. S. 370, an excerpt of the opinion being set forth on page 40 of our brief.

In this case, if jurisdiction be exercised as prayed, the ultimate decision as to whether the plaintiff has or has not the rights it claims will be simultaneously a de-

cision that the defendants have or have not the rights the defendants claim. One movement—the construction of the leases—virtually determines every issue. The claims are *conflicting;* the court, deciding, ends the conflict. But that is not removing clouds from a clear title of the plaintiff; that in this instance is simply the process of *adjudicating* the *plaintiff's* title for or against the *plaintiff* upon claims made by the *plaintiff*.

In (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, the Court of Appeals for the First Circuit reiterated the doctrine for which we have been and here are again contending—the doctrine of *Orton* v. *Smith*, *Holland* v. *Challen*, *Phelps* v. *Harris*—that federal courts must not permit suits disguised as bills to remove clouds from title to become in practical effect suits to adjudicate title. In the *Subirana* case, the court had occasion to say (italics ours):

> "It is well established in the federal courts that 'those only who have a *clear, legal and equitable* title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or to dissipate a cloud on the title.'"
>
> * * * * *
>
> "Furthermore, it is not the jurisdiction of equity to adjudicate upon the *conflicting titles* of parties to real estate—that is for the law court; and one who brings a bill in equity to remove a cloud upon his title must not only set out facts that *he has a clear legal* title, but also set out the pretended title, that it is clearly invalid and such as may, at the present or a future time, embarrass him in controverting it."

Wherefore, courts, especially federal courts, of chancery lack power to act under the pretension of removing clouds from title where the alleged title and the alleged cloud arise from the same clauses in the same granting instrument. The operation of such power necessarily

consists of construing a contract *inter vivos*. The exercise of such jurisdiction would be the adjudication of *conflicting* claims or titles. Equity has not that jurisdiction. Here lies the compelling reason for the doctrine of *First Congregational Church* v. *Page, Phelps* v. *Harris, Devine* v. *Los Angeles,* and other precedents which, we thought, were binding on this court. (See p. 44 of our brief, also.)

There is surely justification for our belief that the court itself regards this as an exceptional case calling for novel application of a remedy never heretofore stretched so broad. In departure from precedent, in the exclusion of Illinois law and in virtual disregard of Supreme Court decisions, this court has opened the doors of chancery to all landlords and tenants who are unable to agree upon the interpretation of long term leases. Just how wide the doors are opened depends upon how exceptional the case, it seems; but whenever large interests are involved in any sincere dispute, so that it may be said one party cannot enjoy the fullest use of his alleged, but dubious, rights because the other party orally differs, then may one hale the other before the chancellor, and then may the chancellor construe their leases and lay down rules of conduct for their future guidance. Of a certainty, this is precisely what the Supreme Court, in (1927) *Liberty Warehouse Co.* v. *Grannis,* ..... U. S. .....; 71 L. Ed. 303; 47 Sup. Ct. Reporter, 282, said federal courts were not able to do where the facts were different but where the question is substantially similar.

Thus, if the opinion stands, is the procedure of declaratory judgments and decrees made available in those cases where property rights are involved under the construction of deeds, leases, party-wall agreements and

other contracts. Possibly the avenue so laid open may be convenient, economical, expedient; but it is not, or, at least, we respectfully urge, was not, the law.

However strongly the ultimate picture may intrigue, the individual conceptions of judges, uninfluenced by seductive plausibleness, should yield to the law. In petitioning this court to reconsider its main holding and to alter its decision to an affirmance, the language of Mr. Justice McReynolds in (1927) *United States* v. *Stone & Downer Co.*, ... U. S. .....; 71 L. Ed. 728 on 738, furnishes our concluding remonstrance:

> "Nearly one hundred years ago, Mr. Justice Story announced the fundamental doctrine which no court should forget: 'Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare "*ita lex scripta est*", to follow, and to obey. Nor, if the principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience.'"

II.

IN ANY EVENT, THE OPINION SHOULD BE MODIFIED TO AVOID PREJUDICIAL INFLUENCE ON TRIAL UPON THE MERITS.

After painstaking examination of the court's opinion, counsel for appellees conclude that the decision is meant to go thus far and no farther: that the district court has jurisdiction to determine the issues raised by the *allegations* of the bill of complaint. In other words, we believe, and in our belief are supported by numerous references of the court to the pleadings rather than to the evidence, that this court has rendered its decision as though the case were here on bill of complaint and a motion to dismiss (demurrer).

Nevertheless, en route to its conclusion, the court, in

its opinion, has had occasion to make statements which are susceptible of interpretation or application prejudicial to the substantive rights of appellees in further proceedings. The caveat to the trial judge is persuasive that such statements are written to reflect only contentions of appellant, but, in view of the broad scope further litigation must take, it would be unfortunate if statements such as the following should erroneously be accepted as the law of this case:

Opinion, p. 7:

> "In the absence of any provision in the lease itself, it is likewise hardly conceivable that a lease for 198 years, or even one for 99 years, should be so construed as to deny to the lessee the right to rebuild as changing conditions require."

Opinion, p. 7:

> "And it then follows, as an unavoidable deduction from the grant for a lease for 198 years, that the building or buildings which were to be constructed thereon should, from time to time, be repaired, and at some time during the existence of the lease be replaced by new buildings."

Opinion, p. 14:

> "Appellant's right to maintain the suit is predicated upon its implied right to rebuild, which arises from the grant of a 198 year lease."

The tenor of these statements seemingly is that the grant for 198 years, by virtue and force of the duration of the term, itself, carries an implied grant of the right to tear down the existing building and to replace it with another building. If that be the law, then, indeed, is little left for the court below to do in the matter of construing the leases. We do not believe this court intended now to construe any line or clause of the leases; and yet, on pages 9, 10 and 11 of the opinion, this court sets out important provisions thereof and says: "Inasmuch as these clauses do not specifically deny appel-

lant's right to rebuild, it is argued * * *." Our realization that that observation (with which we do not and cannot agree) is hitched to consideration of jurisdiction only, is accompanied by our equal realization that every portion of this opinion will be urged hereafter in this case, and in others for which this unusual decision would become a precedent, as authority for the maximum plea.

Whether such implied grant arises from the very duration of the term demised, and whether the above or any clauses in the lease sanction or forbid replacement of any existing structure at any time, are questions of substantive law going to the merits. We are loath to believe that the decision of this court is purposed to determine any such question at all. If it were, surely some of the points set forth in our outline (Appellees' Brief, pp. 3-4) as rules of construction would have received attention and mention.

If the court has equity jurisdiction, the construction and the interpretation of the leases is probably the most important feature of a trial upon the merits. Obviously, if this court has construed the leases in any material matter, its construction omits investigation of the law of waste, judicial interpretation of the numerous covenants in the light of such cases as *Bass* v. *Metropolitan W. S. E. Co.*, 92 Fed. 857, and most of the evidence. Nothing the court says at this stage should prevent us from going to the greatest rightful effect cases such as *The Northern Trust Co.* v. *Thompson*, decided June 14, 1927, in the Appellate Court of Illinois, First District, not yet reported. There the Appellate Court was called upon to construe a 99-year lease of property at Madison and Dearborn Streets, in Chicago, made in 1869. The tenant covered the existing 6-story buildings, 25 years

old, had become "practically worthless" and "wholly inadequate", etc., as here, and offered to erect a modern large building of far greater value, contending that under the lease, "properly interpreted", he had that right. The lessor was a trustee and prayed a state court of chancery for instructions as to whether it should consent to the program. The relevant clauses of the lease and the holding of the court are contained in the following excerpt from the opinion bearing Mr. Justice Gridley's name for the bench:

> "Although there is no express provision in the lease granting to the lessees the right to remove the building upon the premises or to rebuild it, there is a covenant therein on their part that 'in case of loss or damage by fire *or otherwise* to the buildings, now upon said premises *or that may hereafter be erected thereon*,' they will 'rebuild or repair the same within twelve (12) months thereafter, equal in value or condition to the building or buildings so destroyed or damaged.' And counsel for the trustee further contended before the chancellor, and further contend here, that, because of the language of the covenant, and particularly the words italicized, the right in Thompson (assignee by mesne assignments from the original lessees) to remove the present building and erect another in its stead, and the power in the Trustee to execute with Thompson the compromise agreement, may properly be implied. We cannot agree. It seems clear to us that said clause, as regards rebuilding or repairing the building, has reference only to the contingency where the building is destroyed or damaged by fire or other *casualty*, and affords no basis for the claimed implied power on the part of the Trustee. And we fail to see wherein the holdings in the case of *Hawes* v. *Favor*, 161 Ill. 440, cited by counsel, are at variance with these views."

We are prepared to concede that this court had no occasion to travel in these fields of substantive law in order to decide here the one question actually decided;

but we earnestly submit that this court should not leave even so much as an inference of its judicial views in those fields as to the substantive rights of either party under the leases.

Mortgagees.

This court has apparently overlooked the fact that there has been no conference or discussion, verbal or written, between the lessee and the bondholders or mortgage trustee, casting any "cloud" or reflection upon the title to the equity of redemption, so as to authorize any court to meddle with the contract relations of the parties with respect to the mortgages. No one claims that he has talked about that, or that there is any "cloud" upon that title. No one has pointed out anything to give the court jurisdiction over the relations or status of the parties as mortgagor and mortgagee.

One issue of bonds matures February 1, 1929 (Trans., 203); another, March 1, 1933 (Trans., 205); the third, February 1, 1942 (Trans., 203),—total $1,935,000. Even if it be "implied" that the building will not last 198 years, it is not to be presumed that a mortgage lien upon a leasehold estate will go out of style February 1, 1942. Where the parties have not seen fit to contract for substitution, it is not within the functions of the court to offer to the mortgagee, instead of his lien, something else "just as good." The court may think that a Ford car is out of date and that a mortgage upon an airplane is preferable to one on a Ford, but no other court has gone so far as to force its preference upon the mortgagee of an old-fashioned car.

The court says:

"But it is in the security, nothing more, that it is

interested" (p. 13) * * * "the mortgagee" [meaning mortgagor] "offers cash or bond security in twice the amount of the mortgage during the period of construction, or until such time as the court fixes." (p. 14) * * * "Wherein is it prejudiced?" (p. 13).

In assuming such power to act for parties, presumably competent to make their own contracts, the court is apparently blinded to the fact that it is the mortgagees' judgment that should control the terms upon which they will lend their money.

The judges of this court may think that a personal bond or deposit "until such time as the court fixes" is just as good. The lenders trust and back their own business judgment. The judges give no security for the outcome of their judgment upon this financial question of the goodness of a substitute for what the parties have contracted that the bondholders shall have. They are entitled to have the security specified in the contract,—not some substitute of the court's selection. Encroachments upon the inviolability of contracts are no more welcome because made by the court with the statement that the mortgagee is interested "in the security, nothing more"—when that statement implies security of the court's selection instead of the security that the parties contracted that the mortgagee should have.

Another instance should be mentioned. Speaking of the bondholders' rights, the court says, in effect, that the bondholders are bound by the principle of notice—that if the leases permit rebuilding, the bondholders must have known it when they invested their funds. This conclusion is quite true so far as it goes. But an additional consideration must not be overlooked. There are covenants in the trust deeds about preserving the

security, about waste, etc., bearing upon the rights of the lessee as mortgagor. (See answer of Illinois Merchants Trust Company as Trustee, Trans. 148, XII.)

Above all, we trust the court does not think us quibbling over phraseology. We are not unmindful of the fourth paragraph on page 13 of the opinion. Neither are we unconscious of publicly printed interviews in which the president of appellant company was quoted as predicting the resultant probability of early construction of a fifty-story hotel. Finally we do not overlook that in the first sentence of that paragraph, this court says it has refrained from stating appellees' "fact position regarding this clause in the lease". (We are not able to understand just which clause the court means, and we suspect an inadvertence). Our contentions, aside from equity jurisdiction and still to be decided in this suit, are more than simply "fact" positions; they include questions of law, such as waste, the legal construction of the leases in the light of all the evidence and authorities, the power of any court to do that which appellant prays, and so on. Every one of these issues, whether of fact *or of law*, should, we urge, be left utterly open. Some of them, we think, may be unintentionally affected by the present opinion.

Perhaps it may be helpful—and the court graciously has said our efforts heretofore have been helpful—to suggest that the opinion, if this petition for rehearing do not completely avail, be modified so that *all* those portions fraught with danger of prejudice to determination of all substantive questions be expressly defined as simply the allegations of appellant.

We again request the court to reconsider the decision it has rendered.

With this petition, certain of the appellees file also a motion to vacate the order of affirmance and to remand the case to the state court.

Respectfully submitted,

SAMUEL TOPLIFF,

HOMER H. COOPER,

Counsel for Mark S. Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, Deceased; and Mark S. Willing.

MITCHELL D. FOLLANSBEE,

WATSON WASHBURN,

JOHN E. GAVIN,

Counsel for William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, Deceased; Bayard Warren, Jr. and Bayard Tuckerman, Jr., as Trustees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman.

FRANK H. McCULLOCH,

Counsel for Illinois Merchants Trust Company, as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903; etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1889, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1892, etc.

LOUIS M. GREELEY,

Guardian ad litem of Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

ROSWELL B. MASON,

Guardian ad litem of Infant Defendants John Fox Slater, Elena De Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman.

HENRY G. MILLER,

Of Counsel for Roswell B. Mason as Guardian ad litem.

And on the same day, to wit: On the twenty-fifth day of June, 1927, there was filed in the office of the clerk of this court "The Motion of Certain Parties to Vacate All Orders Heretofore Entered, etc." which said Motion is in the words and figures following, to wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, a corporation *vs.* MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, etc., et al.	Pending in this court on appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE MOTION OF CERTAIN PARTIES TO VACATE ALL ORDERS HEREIN HERETOFORE ENTERED AND TO REMAND THIS CAUSE TO THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Mark Skinner Willing and The Northern Trust Co. as Trustees, etc., and Mark S. Willing.
LOUIS M. GREELEY,
Guardian ad Litem for Certain Infant Defendants.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, a corporation *vs.* **MARK SKINNER WILLING** and **THE NORTHERN TRUST COMPANY** as Trustees, etc., et al.	Pending in this court on appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE MOTION OF CERTAIN PARTIES TO VACATE ALL ORDERS HEREIN HERETOFORE ENTERED AND TO REMAND THIS CAUSE TO THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS.

To the Honorable Justices of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come Mark Skinner Willing and The Northern Trust Company as trustees under the last will and testament of Henry J. Willing, deceased, and Mark S. Willing, by Samuel Topliff and Homer H. Cooper, their solicitors; and also Louis M. Greeley, guardian *ad litem* of infant defendants Margaret Willing, Evelyn Pierrepont

Willing and Mark Skinner Willing, Jr., and move the court to vacate all orders herein entered, especially the order of affirmance, and to remand the above entitled cause to the Circuit Court of Cook County, State of Illinois, for each and all of the following grounds:

1. The bill of complaint, at the time the same was filed in said Circuit Court of Cook County, State of Illinois, and at the time of the filing in said state court of the petition of certain defendants to remove the case from said state court to the federal court, did not state or present a controversy which is wholly between citizens of different states and which can be fully determined as between them;

2. The cause of action, if any, as set forth in said bill of complaint at said several times is single and indivisible;

3. The subject matter of the controversy as set forth in the bill of complaint at said several times is single and entire;

4. The bill of complaint at said several times set forth no separable controversy between the plaintiff and the defendants joining in said petition for removal which can be fully determined between them without the presence of other defendants in the case, or some of them;

5. There are parties defendant indispensable to the determination of the above cause who are citizens of the State of Illinois and who were citizens of the State of Illinois when said bill was filed and when said petition for removal was filed, while Illinois was and is the state of residence and citizenship of the plaintiff corporation;

6. The record discloses no grounds of federal jurisdiction;

7. The record discloses no grounds for the removal of said cause from said state court to a federal court;

8. Even though it be said that the suit relates to distinct titles, there are, nevertheless, three or more separate, distinct, independent suits in that view; and the removal of one such suit does not carry with it to a federal court the other such suits.

With this motion, the petitioners annex a memorandum of points and authorities in support thereof and respectfully request the court to consider the same.

MARK SKINNER WILLIAMS and
THE NORTHERN TRUST COMPANY,
As Trustees under the Last Will and Testament of Henry J. Willing, Deceased; and
MARK S. WILLIAMS,
By SAMUEL TOPLEY,
HOMER H. CROSBY,
LEWIS M. GOODLEY,
As Guardians ad Litem for Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO REMAND.

MAY IT PLEASE THE COURT:

The foregoing motion is a repetition of very similar motions made by the same parties in the District Court on December 24, 1924, and on February 2, 1925 (Trans., 292-3) and overruled by Judge Wilbur on (Trans., 296-7) without opinion.

In justice to ourselves, we assure the court we have not omitted to stress the point at any proper time since our study of the case revealed to us its existence. The point appears in our answer to the bill of complaint. (Trans., 303-4.) The decision of the District Court on the issue of equity jurisdiction favored these moving parties, and that situation prevented us from assigning error over to the decree from which this appeal was taken. (1902) *Gunewardene Co. v. Phoenix Co.*, 124 Fed. 170 on 172; (1925) *National F. I. Co. v. Elliott*, 7 Fed. (2nd) 522 on 525. We did, however, invite, in the only manner apparent to us, the attention of this court to the presence of our point in appellee's brief. (Footnote on page 20.)

Furthermore, under sufferance the admission that so long as the courts hold that they had no jurisdiction of the case, these parties, as a practical matter, needed to have little concern as to the grounds for that decision. our position always has been, and is, that no court has any jurisdiction on any theory; that the issue is one for business dealing, not for judicial determination. Since, however, at the time of the filing of this motion, this court has considered that equity jurisdiction exists, we believe it our duty to urge, and to urge in the only

method now known to us, that federal court jurisdiction does not exist under the Removal Act.

THE STATUTE.

The provision of the Judicial Code under which the original defendants (hereafter called the Sears-Slater defendants, being the owners of the "Peck few") filed their petition for removal of the case from the Circuit Court of Cook County to the United States District Court is as follows (Title 28, Chap. 3, Sec. 71; formerly Sec. 28 of Jud. Code, as amended, Act Jan. 20, 1914, c. 11):

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

Our point may be summarized: There is not in this suit a controversy *wholly* between citizens of different states which can be *fully determined* as between *them*.

WHAT IS THE CONTROVERSY?

The first inquiry concerns the nature of the controversy in this lawsuit. As to that, the law is—

> THE EXISTENCE OR NONEXISTENCE OF A SEPARABLE CONTROVERSY IS TO BE DETERMINED WHOLLY BY THE CASE STATED IN THE ORIGINAL BILL OF COMPLAINT AS IT STOOD WHEN THE PETITION FOR REMOVAL WAS FILED.
>
> (1909) *Gregory* v. *Cochin*, 132 U. S. 571; 33 L. Ed. 462.
>
> (1885) *Louisville, etc. Co.* v. *Ide*, 114 U. S. 52; 29 L. Ed. 63.

(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56; 38 L. Ed. 70.

(1906) *Alabama, etc. Co.* v. *Thompson*, 200 U. S. 206; 50 L. Ed. 441.

In the last of these citations, selected from many more, the court says:

> "It has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separate character of the controversy for the purpose of deciding the right of removal. * * * In other words, the right to remove depended upon the case made in the complaint * * *."

So firmly is this rule entrenched that the courts hold subsequent amendments (*Bernheim* v. *Louisville Property Co.*, 221 Fed. 273), or differing and inconsistent defenses by the defendants, or even defaults by defendants (*Louisville, etc. Co.* v. *Ide*, 114 U. S. 522; 29 L. Ed. 63; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280; 29 L. Ed. 898; *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528; *Hax* v. *Caspar*, 31 Fed. 499) are not to be considered. Neither is it material that the interests of the defendants as between themselves are separate and distinct. (*Bellaire* v. *Baltimore, etc. R. Co.*, 146 U. S. 117; 36 L. Ed. 910; *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528; *Wilson* v. *Oswego Township*, 151 U. S. 56; 36 L. Ed. 70; *Bryan* v. *Barriger*, 251 Fed. 328.)

We shall endeavor to conform to the above rule, though if the rule permitted incorporation of the whole record now before this court our contentions would be strengthened in every particular.

What, then, is the issue or controversy as raised by the allegations of the original bill of complaint?

The opinion heretofore rendered by this court evinces our belief that the case stated by the plaintiff has been so impressed upon the memory of the court that the passage of a few weeks has not erased it, and that we need only recapitulate the salient features. The original bill of complaint commences with the making of five separate leases. (Trans., 6-15.) Then, the plaintiff "proceeded at once, by and with the knowledge, consent and procuration of all of the lessors in said several leases" (Trans., 17) "to erect thereon *one entire building.* None of those parts of said building which are located upon the respective tracts of ground demised by the Walker leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

These conditions have continued. The building is described by the plaintiff as "indivisible." (Trans., 18.) The Walker fee comprises about 84 per cent of the total ground area; the Peck fee comprises about 10 per cent, and the Studebaker fee comprises the remaining 16 per cent. The building covers the entire five tracts. Just here we digress briefly to point out that cross-easements of support exist between the fee owners, for the building belongs to the fee owners. (*Springer* v. *Darlington*, 207 Ill. 238; *Gibson* v. *Holden*, 115 Ill. 199; *Ingals* v.

Plamondon, 75 Ill. 118; *Foote* v. *Yarlott*, 238 Ill. 54; *Bass* v. *Metropolitan, etc. R. Co.*, 82 Fed. 857.)

The first mortgage of February 1, 1889, conveyed the leaseholds on all five tracts. (Trans., 15.) So did the second mortgage of February 1, 1892. (Trans., 16.) No apportionment of security and no provision for partial releases as to separate leaseholds appear.

The dilemma of the lessee, predicated upon its allegations of instability of building construction, of financial loss in operation, of impending foreclosure by bondholders and the like, is spread over the entire building. The conclusion is clear that whatever relief can be granted must embrace the whole property. Judicial sanction for removal and replacement of the one "indivisible" building, covering five tracts under five leases and furnishing security under two mortgages, is sought by the plaintiff.

The prayers for relief (Trans., 27-32) necessarily seek establishment of plaintiff's alleged rights as against all the lessors and as against the trustee of the bond issues.

THE PARTIES.

The plaintiff at all times is a citizen of Illinois. (Trans., 3.)

The Sears-Slater defendants, being lessors of the Peck fee, at all times are citizens of states other than Illinois—Massachusetts and New York. (Trans., 112-118.)

The Walker-Willing defendants include Ambrose Cramer, as trustee, and he at all times was a citizen of Illinois. His successor, The Northern Trust Company, is a citizen of Illinois. Mark S. Willing is a citizen of Illinois.

The lessors of the Studebaker fee (the Chapins), defendants, apparently were at all relevant times citizens of Illinois.

The Illinois Trust & Savings Bank as trustee under the bond issues (now Illinois Merchants Trust Company) was at all relevant times a citizen of Illinois.

All of these defendants are indispensable parties. *Without any one of them, the plaintiff's case as stated in its pleading would fail.* Something has been said in the opinion rendered by this court about ability to finance a new enterprise; obviously no money could be borrowed without a decree binding every one of the above defendants.

THE CONTROLLING QUESTION.

Wherefore, in determining whether there is a separable controversy between the plaintiff and the Sears-Slater defendants, the court is called upon to answer this inquiry:

> Can the plaintiff have the relief it seeks without including relief as against all the defendants?

If the answer is "No"—which it surely is—then there is not "a controversy which is wholly between citizens of different states and which can be fully determined as between them," as the removal statute demands.

The answer is "No" because the plaintiff cannot obtain the relief it prays—the right to tear down and replace the indivisible building in its entirety as against lessors, easement holders and mortgage trustee—if any one of the above named defendants succeeds in defeating the plaintiff's claim. The plaintiff must prevail against *all*, else it fails.

THE LAW.

Out of the very many decisions of courts upon the issue here presented, we have selected the following. Some are cited because they are leading cases. Others present more nearly similar facts.

I.

THERE IS NO SEPARABLE CONTROVERSY UNDER THE REMOVAL ACT UNLESS THERE IS A SEPARATE AND DISTINCT CAUSE OF ACTION AS TO THE DEFENDANTS SEEKING REMOVAL WHICH CAN BE DECIDED AS BETWEEN SAID DEFENDANTS AND THE PLAINTIFF IN THE ABSENCE OF ALL THE OTHER DEFENDANTS.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528.

(1886) *East Tenn. etc. R. Co.* v. *Grayson*, 119 U. S. 240; 30 L. Ed. 382.

(1882) *Frazer* v. *Jennison*, 106 U. S. 191; 27 L. Ed. 131.

(1885) *Pirie* v. *Tvedt*, 115 U. S. 41; 29 L. Ed. 331.

(1885) *Crump* v. *Thurber*, 115 U. S. 56; 29 L. Ed. 328.

(1886) *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; 30 L. Ed. 232.

(1886) *Little* v. *Giles*, 118 U. S. 596; 30 L. Ed. 269.

(1883) *Winchester* v. *Loud*, 108 U. S. 130; 27 L. Ed. 677.

(1884) *Ayres* v. *Wiswall*, 112 U. S. 187; 28 L. Ed. 693.

(1894) *Wilson* v. *Oswego Township,* 151 U. S. 56; 38 L. Ed. 70.

(1911) *Railroad Co.* v. *Willard,* 220 U. S. 413; 55 L. Ed. 521.

(1890) *Graves* v. *Corbin,* 132 U. S. 571; 33 L. Ed. 462.

Subsidiary to the main point, the following are helpful:

WHERE THE PLAINTIFF IN ITS PLEADING STATES A JOINT CAUSE OF ACTION AND SEEKS JOINT RELIEF AGAINST ALL OF THE DEFENDANTS, IT IS NOT WITHIN THE POWER OF THE DEFENDANTS OR OF THE COURT TO SPLIT UP THE PLAINTIFF'S CASE INTO SEPARATE AND SEPARABLE CONTROVERSIES.

(1906) *Alabama, etc. R. Co.* v. *Thompson,* 200 U. S. 206; 50 L. Ed. 441.

(1885) *Louisville, etc. R. Co.* v. *Ide,* 114 U. S. 52; 29 L. Ed. 63.

(1890) *Graves* v. *Corbin,* 132 U. S. 571; 33 L. Ed. 462.

(1890) *Louisville, etc. R. Co.* v. *Wangelin,* 132 U. S. 599; 33 L. Ed. 474.

(1911) *Chicago, etc. R. Co.* v. *Willard,* 220 U. S. 413; 55 L. Ed. 521.

WHERE THE PLAINTIFF'S CASE PRESENTS ONLY ONE MAIN ISSUE. DISTINCT ISSUES ARISING BETWEEN THE PARTIES ARE NOT SEPARABLE CONTROVERSIES.

(1892) *Torrence* v. *Shedd,* 144 U. S. 527; 36 L. Ed. 528.

(1915) *American Surety Co.* v. *Conway,* 222 Fed. 140.

The argument has been made by those who heretofore resisted this motion that the jurisdiction of a federal

court may be sustainable under the theory of convenience, *i. e.*, that the bill really contains a permissible collection of independent suits. Our paragraph 8 in our motion before this court meets this contention. The law is:

EVEN IN CASES WHERE DIFFERENT DEFENDANTS MAY PROPERLY BE JOINED IN ONE BILL OF COMPLAINT TO QUIET TITLES TO DIFFERENT TRACTS, SUCH COLLECTION OF ENTIRELY DISTINCT AND INDEPENDENT SUITS IS NOT REMOVABLE UNDER THE STATUTE. ONLY THAT DISTINCT AND INDEPENDENT SUIT BETWEEN THE PLAINTIFF AND THE REMOVING DEFENDANTS AS TO THE ONE TRACT CAN BE REMOVED, AND THE CASE STAYS IN THE STATE COURT EXCEPT THAT PART OF IT RELATING TO THE REMOVING DEFENDANTS.

(1885) *Union P. R. Co.* v. *Myers*, 115 U. S. 1; 29 L. Ed. 319.

(1922) *Commissioners* v. *St. Louis R. Co.*, 257 U. S. 547; 66 L. Ed. 364.

(1916) *Stuart* v. *Colorado, etc. Co.*, 61 Col. 58.

(1914) *Idaho* v. *American Surety Co.*, 218 Fed. 678.

(1882) *Chicago* v. *Hutchinson*, 15 Fed. 129.

(1907) *Deepwater R. Co.* v. *Western, etc. Co.*, 152 Fed. 824.

II.

IT IS THE DUTY OF THE FEDERAL COURTS, AT WHATEVER STAGE OF LITIGATION IT DISCOVERS THAT FEDERAL JURISDICTION IS LACKING, TO REMAND THE SUIT TO A STATE COURT WHERE IT WAS COMMENCED.

(1916) *Charroin* v. *Manufacturing Co.*, 236 Fed. 1011.

(1911) *Chicago, etc. R. Co.* v. *Willard*, 220 U. S. 413; 55 L. Ed. 521.

(1890) *Graves* v. *Corbin*, 132 U. S. 571; 33 L. Ed. 462.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528.

THE RIGHT TO REMOVE ON GROUNDS OF A SEPARABLE CONTROVERSY MUST CLEARLY APPEAR. IF THE FEDERAL COURT IS DOUBTFUL WHETHER THE BILL OF COMPLAINT PRESENTS A SEPARABLE, REMOVABLE CONTROVERSY, THE COURT SHOULD REMAND THE CASE.

(1910) *Wrightsville H. Co.* v. *Colwell*, 180 Fed. 589.

(1919) *Boykin* v. *Morris, etc. Co.*, 257 Fed. 827.

(1902) *Ernst* v. *American, etc., Co.*, 114 Fed. 981.

(1906) *Nash* v. *McNamara*, 145 Fed. 541.

(1909) *Thacker Coal Co.* v. *Norfolk, etc. R. Co.*, 171 Fed. 271.

CONCLUSION.

As we have said several times in the process of this litigation, the lessors and mortgagee consider that the problem presented by the Chicago Auditorium Association is one for settlement on a fair and reasonable basis across the table. All of us are averse to plaintiff's proposal for the infliction of judicial force; for we are convinced that a court cannot grant the prayers for relief without impairing the rights of the fee owners and of the bondholders, without making new contracts and without trespassing upon private rights. The question of jurisdiction must continue to be raised until it can no longer be raised.

Equity jurisdiction—the only issue presented by the appeal of Chicago Auditorium Association—is, we persist in thinking, still *doubtful*. (We say this with all respect to your honors; our petition for rehearing, pending as this memorandum is prepared, evidences our sincere belief that this court's reversal of the District Court is erroneous.) The existence of that doubt has only a slight bearing upon the pending motion. The bearing is that the weight of that doubt ought to be added to the weight of the argument here set forth as to federal jurisdiction under the Removal Act. For the Supreme Court has declared many times that where jurisdiction is merely doubtful, federal jurisdiction should not be retained.

At all times these moving parties have urged that federal jurisdiction is completely lacking; that there is no question of the plaintiff's inability to gain the relief it seeks without joint remedy against all the lessors and the mortgage trustee, and that the entire case ought to be sent back to the Circuit Court of Cook County. Un-

der authorities above cited, the point of federal jurisdiction can be raised at any stage of litigation until the absolute end. This court now has jurisdiction for the purpose. It is the first occasion upon which these moving parties have been enabled or required to stress the particular point during the appellate proceedings.

For all the reasons hereinabove advanced and upon the authorities submitted under the Removal Act, we earnestly urge our motion. The order or orders heretofore entered should be vacated and the record should be returned to the District Court with directions to remand the whole case to the state court, or, in the alternative, to remand so much of the case as does not concern exclusively the Sears-Slater defendants.

Respectfully submitted,

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Mark Skinner Willing and The Northern Trust Co. as Trustees, etc., and Mark S. Willing.

LOUIS M. GREELEY,
Guardian ad Litem for certain infant defendants.

And on the same day, to wit: On the *twenty-fifth day of June, 1927*, there was filed in the office of the clerk of this court a certain Proof of Service, which said Proof of Service is in the words and figures following, to wit:

In the United States Circuit Court of Appeals

For the Seventh Circuit.

Chicago Auditorium Association,
Appellant,
—vs—
Mark Skinner Willing, *et al.*,
Appellees.
No. 3733.

NOTICE AND RECEIPT.

To Walter L. Fisher, Esq., and William W. Cook, Esq., of Messrs. Fisher, Boyden, Kales & Bell, Counsel for Appellant:

Please Take Notice that the undersigned, as counsel for appellees, are filing in above entitled cause a petition for rehearing in accordance with Rule 26 of the above entitled court and in accordance with practice. Copies of said petition are herewith handed to you.

Samuel Insull
Horace H. Chase,
Counsel for Mark Skinner Willing and The Northern Trust Company, as Trustees, etc., and Mark S. Willing;
Pierce H. McCullough,
Counsel for Illinois Merchants Trust Company, as Trustee, etc.
Winthrop D. Pinkerton,
Wilson Wentworth,
James E. Gorin,
Counsel for William A. Glasier, et al., Trustees, etc.
Lewis M. Gunther,
Guardian ad litem of certain infants.
Howard B. Wood
(Howard G. Wilson, his counsel)
Guardian ad litem of certain infants.

Received a copy of this notice and also copies of the petition for rehearing therein mentioned, this 26th day of June, 1922.

Walter L. Fisher
Wallace W. Cox.

Endorsed: No. 3735. In the United States Circuit Court of Appeals For the Seventh Circuit. Chicago Auditorium Association, Appellant, vs. Mark Skinner Willing, et al., Appellee. Notice and Receipt. Filed Jun 26 1922 Edward U. Holloway, Clerk. Hamlin, Dunniff & Cooper, Suite 1301-1307 105 South La Salle Street. Telephone Randolph 2960.

And on the same day, to wit: On the twenty-fifth day of June, 1922, there was filed in the office of the clerk of this court a Notice and Proof of Service, which said Notice and Proof of Service is in the words and figures following, to wit:

In the United States Circuit Court of Appeals

For the Seventh Circuit.

Chicago Auditorium Association, *Appellant*, vs. Mark Skinner Willing, *et al.*, *Appellees*. } No. 3735.

NOTICE OF MOTION.

To Walter L. Fisher, Esq., and
William W. Cox, Esq., of
Messrs. Fisher, Boyden, Bates & Bell,
Counsel for Appellant;
Frank H. McCulloch,
Counsel for Illinois Merchants Trust Company, et al., Trustees, etc.
Winfield D. Follansbee,
Watson Washburn,
John E. Gavin,
Counsel for William A. Slater, *et al.*, Trustees, etc.
Russell D. Mann (Messrs. G. Willis, his counsel) Guardian *ad litem* of certain infants:

Please Take Notice that the undersigned, as counsel for

certain appellees, are filing in above entitled cause their motion to vacate all orders herein heretofore entered and to remand this cause to the Circuit Court of Cook County, State of Illinois. Said motion and a memorandum of points and authorities in support thereof are filed in connection with a petition for rehearing likewise filed by said moving parties as appellees. Copies of said motion and of said memorandum are herewith handed to you.

Samuel Tuttle,
Homer H. Cooper,
Counsel for Mark S. Willing and The Northern Trust Company, as Trustees, etc., and Mark S. Willing;
Louis W. Gramley,
Guardian ad litem of certain infants.

Received a copy of this notice and also notice of the motion and memorandum therein mentioned this 24th day of June, 1927.

Walker L. Fisher,
Warren W. Cook,
Frank H. McClennen,
Henry G. Miller,
Edwards & Moore,
Benjamin B. Poindexter,
Watson Washburn,
James E. Gorey,

Endorsed: No. 3733. In the United States Circuit Court of Appeals for the Seventh Circuit. Chicago Auditorium Association, Appellant, v. Mark Skinner Willing, et al., Appellees. Notice of Motion. Filed June 25, 1927. Edward U. Holloway, Clerk. Louis W. Gramley, 105 S. La Salle Street, Chicago, Illinois, and Hamlin, Tuplitt & Cooper, Suite 1301-1302, 105 South La Salle Street, Telephone Randolph 1841.

And afterwards, to wit: On the first day of July, 1927, there was filed in the office of the clerk of this court a certain Answer to Petition for a Rehearing, which said Answer to Petition for a Rehearing is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733

Chicago Auditorium Association, *Appellant,*
vs.
Mary Skinner Willing, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER OF APPELLANT TO PETITION FOR REHEARING.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

Endorsed: Filed Jul 1 1927 Edward M. Holloway, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733

Chicago Auditorium Association, *Appellant*,
vs.
Mark Skinner Willing, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER OF APPELLANT TO PETITION FOR REHEARING.

I.

The Decision of the Court.

Appellees contend first that the decision of this court on the jurisdictional question is erroneous. We can see no useful purpose in reiterating arguments which have already received such ample consideration. Two or three last-minute decisions are cited by appellees under this head.

The *Subirana* case is one in which a claimant of land in Porto Rico, being out of possession and having an adequate remedy at law, was denied relief in equity, the court saying:

> "The bill undoubtedly alleges a cause of action at law for trespass, but no ground for the interposition of a court of equity."

In the *Liberty Warehouse Company* case, the court declined to extend its equitable jurisdiction in pursuance of a statute of the Kentucky Legislature authorizing the entry of declaratory judgments irrespective of the existence or non-existence of a real justiciable controversy. The distinction so often insisted upon by the Supreme Court, and carefully indented in appellant's briefs, between moot questions of a still speculative character and present justiciable controversies, is consistently observed, and the court says:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under

the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope."

II.

Criticism of the Opinion in Matter of Form.

The next objection of appellees is to the form of the court's opinion. This is a matter in which we do not presume to meddle, except to say that the actual scope of the decision is clearly indicated by the language of the opinion itself, and that we do not see how the court could well have said less. If equitable jurisdiction were to be determined by invoking one or two mechanical rules, there might be some point in this criticism. The idea that the court should function *in vacuo* is naturally acceptable to counsel who scent a danger in any consideration of the actual case before the court, and of the facts and necessary conclusions which justify the court in assuming and retaining jurisdiction.

Here, again, counsel reveal their singular obsession, sufficiently noticed in our briefs, about the significance of the case of *Bass* v. *Metropolitan West Side Elevated Railroad Company*. The only additional authority now cited is an opinion handed down June 14, 1927, by the Illinois Appellate Court in *The Northern Trust Company* v. *Thompson*, in which the court used language about the rights of a lessee under a long term lease inconsistent with certain views expressed by this court in the present case. The Northern Trust Company owned the fee to the demised property as trustee, and negotiated with the lessee a written agreement about rebuilding, which was not to be operative, however, until approved by a court of equity. Judge Ryner, in the Cook County Circuit Court, entered a decree approving the agreement, but judgment was reversed by the Appellate Court on the grounds that the lease did not by its own force give the lessee the right to rebuild; that the trust instrument did not empower the trust company to enter into the proposed agreement; and that no necessity was shown sufficiently acute to justify a court in overriding the terms of the trust. It is the language of the court regarding the first of these points upon which appellees now rely. The case might, no doubt, be distinguished in various ways from the one now under consideration, but we think we need only say about it

now (1) that the examination and discussion of the question by the Illinois Appellate Court was very superficial in comparison with the attention bestowed upon it by this court, other features of the case engaging a great part of the state court's attention; (2) that counsel and the court did not enjoy the advantage of a perusal of this court's opinion in the present case; and (3) that this disadvantage has now been remedied, and a petition for rehearing has been filed and is now pending in the Appellate Court of Illinois, in which adequate extracts from this court's opinion are incorporated.

III.

Trustees and Bondholders.

Mindful, perhaps, of the rebuke administered at the oral argument and implied in the written opinion, counsel who assumes to represent the Illinois Merchants Trust Company, trustee under the trust deeds, but who expressly disclaims any representation of the bondholders, returns to the encounter and still insists upon his inviolable legal right to sacrifice for a supposed legal technicality the interests of the investors who are his real but not his nominal clients. In the original bill of complaint (Rec., 30) the Illinois Merchants Trust Company, by its then name Illinois Trust and Savings Bank, was made a defendant both as trustee and as representative of the bondholders, but counsel for the bank disclaimed any authority to represent the bondholders (Rec., 105) and insisted that they themselves were necessary parties. This attitude of the bank led plaintiff to select members of each of the three groups of bondholders as representatives of the class to which they belonged, and to make them defendants in that capacity, and each of these representative groups of bondholders filed an answer (Rec., 151, 153, 155) consenting to the relief sought by the bill of complaint. This was done after written notice had been mailed by the bank to all known bondholders (Rec., 205, 206) advising them that certain individual bondholders had been made parties as representatives of the entire class, but that any bondholder was at liberty to appear by independent counsel. It is in the face of these meticulous precautions, which were taken in the name of the bank but in fact by appellant

(Rec., 207), that counsel assuming to represent the bank takes the position disclosed by the present record.

The interests of the bondholders are in all material respects identical with those of the plaintiff. After protesting that as attorney for the bank he does not and cannot represent the bondholders, after forcing plaintiff to bring the bondholders before the court by appropriate amendments, and after the bondholders themselves have in effect united with plaintiff in the prayer of its bill, counsel still seeks in the name of the bank, whose only legitimate concern is the protection of the bondholders, to interpose every obstacle within his power to the granting of the relief they seek.

We give this branch of the case more attention than it seems to us to deserve upon the merits, and we do so because the position taken by counsel for the bank on the oral argument, and now renewed in this petition for rehearing, is as mysterious and incomprehensible to us as it appears to be to the members of this court.

IV.

Rumors.

Were we to follow the example set by appellees on page 14 of their petition for a rehearing by referring to matters such as newspaper reports outside of the record, we might mention the disastrous effects of the announced proposal of the Chicago Opera House Company to abandon the Chicago Auditorium theatre and provide itself with a home of its own, thus depriving appellant of one of its chief sources of revenue; and we might comment upon the enormous increase in appellants expenses due to the renewal of its contract for light, heat and power at vastly augmented cost; to the great increase in its ground rent occasioned by the decennial reappraisal of the Studebaker property; to the steady advance of general taxes; and to the unfavorable financial results of operation since the evidence was closed in the court below. Even if these matters were in the record, however, they would not alter the essential features of the case, and are no more proper for the consideration of the court than the other matters of alleged notoriety instanced in the petition for rehearing.

V.

Federal Jurisdiction.

Along with the petition for rehearing there has been served upon us a motion on behalf of part of the petitioners asking this court to vacate all orders, and especially the order of affirmance (*sic*), and remand the cause to the Circuit Court of Cook County. Interpreting this as a motion to send the case back to the District Court with directions to remand it to the state court, we are in some doubt with respect to the wishes of this court in dealing with the motion.

We have been at all times and now are ready to meet the appellees, or any of them, on the issue of federal jurisdiction. This is a question which can, of course, be raised at any time by any court in which the case is pending, upon its own motion or otherwise. This case appears to be pending here only upon motion for rehearing, and we should suppose that unless that motion was first granted, and the order of reversal and remandment vacated, this court would not wish to burden itself with a jurisdictional question which parties might have brought to the attention of this court at an earlier stage. We are ready whenever called upon to file a formal brief with full citation and discussion of the authorities, but until the pleasure of the court is otherwise indicated, we content ourselves with a brief memorandum of points and supporting decisions.

The active defendants in this cause occupy two camps, having identical interests but adopting different tactics. There are the Sears interests, owning part of the fee, and the Willing interests, owning another part. The Sears defendants reside in the east, and the Willing defendants in Illinois. The original bill was filed in the Circuit Court of Cook County against both groups to remove clouds upon their separate leasehold estates arising out of identical states of fact. The removal of such cloud from the leasehold estate in the Sears property would in no manner affect the owners of the Willing interest. The issues between the plaintiff and the two groups of defendants were and are entirely distinct, but by reason of the identity of the questions involved the causes of action were properly combined in a single proceeding. This is the situation commonly presented whenever any question arises about the removability of a separate controversy. In accordance with established rules of pleading, the

plaintiff united in one suit controveries or causes of action which might have been prosecuted separately, as is always permissible when there is a determining point common to the entire litigation. Such was the condition of this cause when pending in the state court. On the principle no doubt of a fair division of labor, the Sears defendants removed the cause to the federal court on the allegation of a separable controversy between them and the plaintiff, and after Judge Wilkerson had denied a motion to dismiss the bill for want of equitable jurisdiction the Willing interests moved to remand the cause to the state court, claiming that the alleged separable controversy did not exist.

This motion was argued at length before Judge Wilkerson, at whose request a brief memorandum of points, with supporting citations of authority but without extended written argument, was filed in his court. We provisionally adopt the same course now, while awaiting any further requirements of this court.

1. If in any suit otherwise removable there is a controversy between citizens of different states which can be fully determined between them, any defendant actually interested in such controversy may remove the suit to the federal court.

Judicial Code, Section 28.

2. A plaintiff, having two causes of action which present a common and decisive point of litigation, may at his election prosecute them separately or combine them in a single suit. If he adopts the latter alternative and some of the defendants remove their separable controversy to the federal court, the whole cause is removed, and the other defendants cannot refuse to go into the federal court because they are all citizens of the same state with the plaintiff and might have been sued separately.

Barney v. *Latham*, 103 U. S. 336.
Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Bitterman v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205.
Curran v. *Campion*, 85 Fed. 67.
Wyman v. *Bowman*, 127 Fed. 257.
Boatman's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied, 198 U. S. 586).
Elder v. *Western Mining Co.* 237 Fed. 966, 977.
Commodore's Point Terminal Co. v. *Hudnall*, 283 Fed. 150, 176.
Lake Charles Mill Company v. *Pacific Rice Grower's Association*, 295 Fed. 246, 250.

3. A bill to quiet title, or for similar relief, which contains no allegation that the defendants claim jointly or from a common source, or that any privity of interest exists between them, presents a separable controversy, the defendants being joined for convenience.

Connell v. *Smiley*, 156 U. S. 335.
Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Goodenough v. *Warren*, 10 Fed. Cas. 5534.
Field v. *Lownsdale*, 9 Fed. Cas. 4769.
Goldsmith v. *Gilliland*, 24 Fed. 154.
Stanbrough v. *Cook*, 38 Fed. 369.
Bacon v. *Felt*, 38 Fed. 870.
Bates v. *Carpentier*, 98 Fed. 452.
Carothers v. *McKinley Mining Co.*, 116 Fed. 947.
McMullen v. *Halleck Cattle Co.*, 193 Fed. 282.

4. Where, moreover, the material facts pleaded disclose the presence of a separable controversy, the right of removal exists.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Boyd v. *Gill*, 19 Fed. 145.
Winfield v. *Wichita Gas Co.*, 267 Fed. 47.

5. While a controversy, to be removable, must be one which can be wholly determined between citizens of different states, it is only the necessary and indispensable parties who are to be considered. Those may be disregarded who are properly joined in the suit but are not indispensable to its determination.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Barney v. *Latham*, 103 U. S. 205.
Connell v. *Smiley*, 156 U. S. 335, 340.
Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U. S. 182.
Boatmen's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied 198 U. S. 586).
Venner v. *Southern Pacific Co.*, 279 Fed. 282 (certiorari denied 258 U. S. 628).
Old Dominion Oil Co. v. *Superior Oil Corporation*, 283 Fed. 636.

6. It is the duty of the court to make the proper alignment of parties in accordance with the essential character of the case, without regard to their position as plaintiff or defendant in the pleadings.

Removal Cases, 100 U. S. 457.

Niles-Bement Co. v. *Iron Moulders Union,* 254 U. S. 77.

Boatmen's Bank v. *Fritzlen,* 135 Fed. 650 (certiorari denied 198 U. S. 586).

7. Except in eminent domain or special assessment proceedings or other instances where distinct causes of action may be joined in one proceeding by authority of some special statute, the removal of a separable controversy carries the entire cause to the federal court.

Barney v. *Latham,* 103 U. S. 205.

Brooks v. *Clark,* 119 U. S. 502.

Connell v. *Smiley,* 156 U. S. 335.

Road Dist. v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547.

Pacific Railroad Removal Cases, 115 U. S. 1.

Deepwater Railway Co. v. *Western Pocahontas Co.,* 152 Fed. 824.

Young v. *Southern Pacific Co.,* 15 Fed. (2d) 280.

All of which is respectfully submitted.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

And on the same day, to wit: On the first day of July, 1927, there was filed in the office of the clerk of this court a Proof of Service, which said Proof of Service is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago Auditorium Association, *Appellant,* *vs.* Mark Skinner Willing, *et al.,* *Appellees.*	No. 3733.

PROOF OF SERVICE OF ANSWER OF APPELLANT TO PETITION FOR REHEARING.

Please Take Notice that today, July 1, 1927, we are filing with the Clerk of the United States Circuit Court of Appeals

for the Seventh Circuit the answer of Appellant to petition for rehearing in the above entitled cause.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

Received a copy of the foregoing notice and a copy of Answer of Appellant to Petition for Rehearing this 1st day of July, 1927.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Counsel for Mark S. Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, deceased, and Mark S. Willing.

MITCHELL D. FOLLANSBEE,
ROBERT W. SCHUPP,
JOHN E. GAVIN,
WATSON WASHBURNE,
Counsel for William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, deceased; Bayard Warren, Jr., and Bayard Tuckerman, Jr., as Trustees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman.

FRANK H. MCCULLOCH,
Counsel for Illinois Merchants Trust Company as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated Feb. 1, 1889, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated Feb. 1, 1892, etc.

LOUIS M. GREELEY,
Guardian ad litem of Infant Defendants Margaret Willing, Evelyn Fitzsimmons Willing and Mark Skinner Willing, Jr.
ROSWELL B. MASON,
Guardian ad litem of Infant Defendants John Fox Slater, Elena De Steuer, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman.
HENRY G. MILLER,
Of Counsel for Roswell B. Mason as Guardian ad litem.

Endorsed: General No. 3733. In the United States Circuit Court of Appeals, for the Seventh Circuit. Chicago Auditorium Association, Appellant, vs. Mark Skinner Willing, et al., Appellees. Proof of Service of Answer of Appellant to Petition for Rehearing. Filed July 1, 1927. Edward M. Holloway, Clerk. Fisher, Boyden, Kales & Bell, 134 S. La Salle Street, Chicago. Telephone Franklin 2225.

And afterwards, to wit: On the thirtieth day of August, 1927, the following further proceedings were had and entered of record, to wit:

Tuesday, August 30, 1927.

Court met pursuant to adjournment.

Present:
Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Chicago Auditorium Association
3733 vs.
Mark Skinner Willing, *et al.*
} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the motion of certain parties to vacate all orders herein heretofore entered and to remand

this cause to the Circuit Court of Cook County, State of Illinois, &c, and the same is hereby denied.

Chicago Auditorium Association
ETC.
vs.
Mark Skinner Willing, *et al.*

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby overruled.

And afterwards, to wit: On the first day of September, 1897, the following further proceedings were had and entered of record, to wit:

Thursday, September 2, 1897.

Court met pursuant to adjournment.

Present:

Hon. Samuel Shellabarger, Circuit Judge.
Edward H. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Chicago Auditorium Association
ETC.
vs.
Mark Skinner Willing, *et al.*

On motion of counsel for appellee, counsel for appellant present and objecting thereto, it is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

United States Circuit Court of Appeals

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 585 to 665, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of

Chicago Auditorium Association,

Appellant,

vs.

Mark Skinner Willing, *et al.*

Appellees.

No. 3733, October Term, 1926, as the same remains upon the file and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Third day of September, A. D. 1927.

(Seal)

Edward M. Holloway,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 21, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(15)

SUPREME COURT OF THE UNITED STATES.

No. 561.—October Term, 1927.

Mark Skinner Willing, et al., Petitioners, vs. Chicago Auditorium Association.	On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 21, 1928.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, which was begun in a state court of Illinois by the Chicago Auditorium Association, is said to be in the nature of a bill to remove a cloud upon title. All of the parties except a few of the defendants are citizens of Illinois. These claimed that as to them there was a separable controversy, and they secured a removal of the whole cause to the federal court for northern Illinois. There Willing and other defendants moved to dismiss on the ground that the bill was not within the jurisdiction of a court of equity and that the court "is without jurisdiction of the subject matter of the case, made or attempted to be made by the bill." The court was of opinion that the case presented questions which should be determined only upon answers and proofs; denied the motions to dismiss, without prejudice to any question raised by either party touching the motions; and directed the defendants to answer. After hearing the case fully on the evidence, the District Court dismissed the bill "for want of equity jurisdiction in the court to grant any relief upon the pleadings and the evidence, but without prejudice to whatever rights the plaintiff may have . . when asserted in any appropriate proceeding or otherwise." 8 F. (2d) 998.

The Circuit Court of Appeals held that the suit was cognizable in a court of equity as one to remove a cloud upon title; and it reversed the decree with direction to the District Court to hear the evidence and determine the issues involved. 20 F. (2d) 837. This Court granted a writ of certiorari, 275 U. S. —. Motions by Willing and others to remand the cause to the state court had been made

in the District Court on the ground that the controversy involved was single and entire as to all the defendants. The motions, which that court denied, were renewed in the Circuit Court of Appeals and again denied. We have no occasion to consider whether the alleged controversy was separable. For we are of opinion that the proceeding does not present a case or controversy within the range of judicial decision as defined in Article III of the Federal Constitution.

The facts alleged and proved are these. The Association, an Illinois corporation, was organized in 1886 for the purpose of constructing and maintaining in Chicago a building containing a large auditorium, galleries for exhibition of works of art, offices and other rooms; to provide thereby and otherwise, for the cultivation of music, the drama and the fine arts, and for holding in Chicago political and other conventions; and to use the premises for any and all purposes of profit. To this end, the Association became, in 1887, the ground lessee of five adjacent parcels of land for the term of 99 years, under five separate, substantially similar indentures. Three of the leases were later extended to the year 2085. On this land the Association built, before 1889, the single monumental structure now standing, known as the Auditorium Building, which contains, besides the auditorium, a recital hall, studios, a hotel, and many business offices. The cost of construction and maintenance was defrayed by stock issues aggregating $2,000,000, and by issues of bonds of which $1,375,000 are outstanding.

The building is now in fairly good condition, and continues to serve well the purposes for which it was constructed. The payments of rent and interest have been made regularly. Thus neither the public, the landlords, nor the bondholders have cause for dissatisfaction. But, for the stockholders, the investment has never been financially remunerative. In forty years only one dividend has been paid; and that was one and a half per cent. Considered as a financial investment, the building is now obsolete in design; and it is incapable of alteration without unjustifiable expense. The highest and best use of the property for the financial gain of the tenant would now be the replacement of this structure by a modern one adapted for business. The Association desires to erect a large modern commercial building of greatly increased height, the cost of which may be as much as $15,000,000. Appropriate changes in

its charter powers have been made. Recently some of the stock has been acquired by the President of the corporation at a small fraction of its par value.

There is no provision in the leases which in terms gives the Association the right to tear down this building and erect another in its place. It may be that the building, as and when constructed, became, and now is, property of the lessors. Compare *Kutter* v. *Smith*, 2 Wall. 491; *Bass* v. *Metropolitan West Side Elevated Railway Co.*, 82 Fed. 857. The leases contain certain provisions which may be construed as denying, by implication, any right to tear down the building even to replace it by a better one. They declare that the building is security for payment of rent and for the performance of all other covenants imposed upon the tenant; that the tenant shall "keep the building situated upon said demised premises . . . in good repair, and in a safe and secure condition, . . . and all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease"; that the tenant shall rebuild or repair the building, in event of damage or destruction by fire, upon the same plan as was followed in the original structure or upon such other plans as are approved by the lessors; and that the landlords shall pay the tenant the appraised value of the improvements at the end of the term.

Counsel for the Association are of opinion that it has the legal right to tear down the building and to construct the new one, without first obtaining the consent of the several lessors and of the trustee for the bondholders, provided adequate security is furnished for the payment of the ground rent pending the completion of the new building. But the Association deemed it advisable to obtain the consent of the lessors and of the trustee. To that end, negotiations were opened with Willing and one other of the lessors, and there was some talk of purchasing their interests. In the course of an informal, friendly, private conversation, Willing stated to the President of the Assocaton that his counsel had advised that the lessee had no right to tear down the Auditorium Building without the consent of the lessors and of the trustee for the bondholders. Several of the lessors were never approached by anyone on behalf of the Association. Nor was the trustee for the bondholders. After this talk with Willing, a year passed without further occurrence. Then, the suit at bar was begun against all the lessors and the trustee for the bondholders.

The bill alleged that "under the proper construction and interpretation of the terms, covenants and conditions of said several leases, your orator is fully empowered and has the right to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors or their successors and assigns, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement; but the defendants hereinafter named, or some of them, nevertheless claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants and conditions of said leases . . The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of the said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law."

The bill prayed "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises, upon giving proper security . . ; and that said defendants may also be restrained and enjoined from taking any steps to prevent your orators from tearing down or removing the present building . . ."

There is not in the bill, or in the evidence, even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised

premises authorized by the leases. There was neither hostile act nor a threat. There is no evidence of a claim of any kind made by any defendant, except the expression by Willing, in an amicable, private conversation, of an opinion on a question of law. Then, he merely declined orally to concur in the opinion of the Association that it has the right asserted. For that, or for some other reason, several of the defendants had refused to further the Association's project. Other defendants had neither done nor said anything about the matter to anyone, so far as appears. Indeed, several refrained, even in their answers, from expressing any opinion as to the legal rights of the parties.

Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong, either at law or in equity. And the case lacks elements essential to the maintenance in a federal court of a bill to remove a cloud upon title. The alleged doubt as to plaintiff's right under the leases arises on the face of the instruments by which the plaintiff derives title. Because of that fact, the doubt is not in legal contemplation a cloud, and the bill to remove it as such does not lie. It is true that the plight of which the Association complains cannot be remedied by an action at law. But it does not follow that the Association may have relief in equity in a federal court. What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74. Compare *Liberty Warehouse Co.* v. *Burley Tobacco Growers Ass'n*, 275 U. S. —. The statement, made at the bar, that *Blair* v. *Chicago*, 201 U. S. 400, 450, supports the jurisdiction, is unfounded.

It is true that this is not a moot case, like *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, and *United States* v. *Alaska S. S. Co.*, 253 U. S. 113; that, unlike *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 444, and *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, the matter which it is here sought to have determined is not an administrative question; that the bill presents a case, which if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike *Gordon* v. *United States*, 117 U. S. 697, a final judgment might be given; that, unlike *South Spring Hill Gold Mining Co.* v.

Amador Medean Gold Mining Co., 145 U. S. 300, the parties are adverse in interest; that, unlike *Fairchild* v. *Hughes*, 258 U. S. 126, and *Massachusetts* v. *Mellon*, 262 U. S. 447, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike *New Jersey* v. *Sargent*, 269 U. S. 328, the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in *Muskrat* v. *United States*, 219 U. S. 346, 361, and *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162. But still the proceeding is not a case or controversy within the meaning of Article III of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter. *Cross* v. *DeValle*, 1 Wall. 1, 14-16. Compare *Jackson* v. *Turnley*, 1 Drew. 617, 627; *Rooke* v. *Lord Kensington*, 2 K. & J. 753, 760; *Lady Langdale* v. *Briggs*, 8 DeG. M. & G. 391, 427.

As the proceeding is not a suit within the meaning of § 28 of the Judicial Code, the motions to remand the cause to the state court should have been granted. *Stewart* v. *Virginia*, 117 U. S. 612; *Upshur County* v. *Rich*, 135 U. S. 467; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U. S. 440, 447. Whether, as the respondent contends, it has a remedy under the law of Illinois, we have no occasion to consider. *Fulwiler* v. *McClun*, 285 Ill. 174. Compare *McCarty* v. *McCarty*, 275 Ill. 573; *Greenough* v. *Greenough*, 284 Ill. 416; *Devine* v. *Los Angeles*, 202 U. S. 313, 334-335. Even a statute of the State could not confer a remedial right to proceed in equity in a federal court in a suit of this character. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 561.—October Term, 1927.

Mark Skinner Willing, et al., Petitioners, vs. Chicago Auditorium Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 21, 1928.]

Concurring opinion of Mr. Justice Stone.

I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by §§ 24, 28, of the Judicial Code. But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this Court is without constitutional power to review such judgments of state courts when they involve a federal question. Compare *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123, 130-134. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States*, 196 U. S. 283, 295. See *Blair* v. *United States*, 250 U. S. 273, 279; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 177; *Light* v. *United States*, 220 U. S. 523, 538. There is certainly no "case or controversy" before us requiring an opinion on the power of Congress to incorporate the declaratory judgment into our federal jurisprudence. And the determination now made seems to me very similar itself to a declaratory judgment to the effect that we could not constitutionally be authorized to give such judgments—but is, in addition, prospective, unasked, and unauthorized under any statute.